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92-52

No. _____

Supreme Court, U.S.
FILED
JUN 29 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

COLUMBIA GORGE UNITED—
PROTECTING PEOPLE AND PROPERTY,

Petitioner,

v.

CLAYTON K. YEUTTER, Secretary of Agriculture
of the United States; and the
COLUMBIA RIVER GORGE COMMISSION,

Respondents,

and

FRIENDS OF COLUMBIA RIVER GORGE,

Intervenor-Respondent.

**Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. The Columbia River Gorge National Scenic Area Act (the Gorge Act), 16 U.S.C. §§ 544-544p, purports to establish a compact between the States of Washington and Oregon whereby a commission, subject to veto power by the Secretary of Agriculture, shall establish local land use controls for federal, state, and private property. These land use controls must be adopted by local governmental entities. Has the federal government unlawfully usurped the power of the states and local communities in violation of the Commerce Clause, the Tenth Amendment, the Guarantee Clause, the Property Clause, and the Compacts Clause of the United States?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to this action.

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DECISIONS BELOW

The decision of the Ninth Circuit Court of Appeals, *Columbia River [sic] Gorge United—Protecting People and Property v. Yeutter*, No. 90-35588, is reported at 960 F.2d 110 (9th Cir. 1992), and is reproduced as Appendix A. Page references are to the version in the appendix.

The decision of the Federal District Court of Oregon, Case No. CV 88-1319-PA, is reported at 21 Envt'l L. Rep. 21,162 (1990), and reproduced in Appendix B.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was entered on March 30, 1992, and was filed that same day. No petition for rehearing was sought. In accordance with Supreme Court Rule 13, this petition for certiorari is timely filed. This case involves a constitutional challenge to a federal statute. As such, the federal courts have jurisdiction pursuant to 28 U.S.C. § 1331. This petition is being filed in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this case are the Commerce Clause, Art. I, § 8, No. 3; the Property Clause, Art. IV, § 3, No. 2; the Compacts Clause, Art. I, § 10, No. 3; the Guarantee Clause, Art. IV, § 4; and the Tenth Amendment to the United States Constitution. The relevant constitutional provisions are spelled out in Appendix C, except for the Guarantee Clause which provides that the "United States shall guarantee to every State in this Union a Republican Form of Government."

Statutory provisions at issue are the provisions of the Gorge Act, codified at 16 U.S.C. §§ 544-544p, Pub. L. No. 99-663, 100 Stat. 4274 (1986), as set out in Appendix D.

STATEMENT OF THE CASE

This petition involves a challenge to the constitutionality of the Gorge Act, 16 U.S.C. §§ 544-544p, Pub. L. No. 99-663, 100 Stat. 4274 (1986).

The Gorge Act was signed into law on November 17, 1986. Members of petitioner association, Columbia Gorge United—Protecting People and Property (CGU), are persons who own real property in the Columbia River Gorge and who have been adversely affected by the Gorge Act. Defendants are the Secretary, to whom the Gorge Act grants plenipotentiary supervisory power over all land use decisions in the Gorge, and the Columbia River Gorge Commission (Commission) which is the governmental agency that enforces the terms of the Gorge Act.

On November 16, 1988, pursuant to 28 U.S.C. § 1331, petitioner filed a complaint in Federal District Court in Oregon seeking declaratory and injunctive relief, specifically requesting that the court find the Gorge Act unlawful and enjoining the Secretary and the Columbia Gorge Commission from carrying out the mandates of the Gorge Act.

The Columbia River Gorge National Scenic Area Act divides the Gorge into three parts: Urban Areas, General Management Areas (GMAs), and Special Management Areas (SMAs). The federal government owns virtually no land in the Urban Areas, approximately 1.9% in GMAs, and 37.5%, mostly national forest land, in SMAs.[1] *See*

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[1] The total scenic area covers 285,087 acres, which includes 31,500 acres of the Columbia River itself. At the time of the passage of the Act, the Urban Areas contained 28,000 acres of land. The GMAs had 113,257 acres of nonriver land and the SMAs 112,330 acres.

(Continued on following page)

Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 ENVTL. L. 863, 934, *et seq.* (1987).

Overall, the federal government owns 17.4% of the land in the entire scenic area. Against this backdrop, Congress has surmised that the scenic qualities of the Gorge are outstanding, as they are, and that the scenic view somehow could not survive without the providence of federal intervention. Because of the federal government's rather limited direct interest and ownership of the area, it decided not to accomplish this directly. Instead, through a coercive compact mechanism, it drafted the cooperation of state and local governments in an attempt to legitimatize its foray into local land use planning.[2]

In the GMAs, 92.3% of the land was privately owned, 5.8% owned by state and local governments, and 1.9% federally owned. The SMAs contained 112,330 acres, of which 45.9% was owned by private individuals, 16.6% by state and local governments, and 37.5% by the federal government. Of the total area, the federal government owned 15.5% (44,204 out of 285,087 acres) or 17.4% of the total nonriver areas (44,204 out of 253,587 acres).

[2] Rather than being a model of harmonious legislating, the Act was subject to some bitter dispute in Congress. For example, Representative Robert F. Smith noted that initially under the Gorge bill Oregon's "land use laws would not be impacted nor superseded by any Federal authority." But as finally adopted, "none of those agreements, nor none of that pact has held up." 132 Cong. Rec. H10,486 (Oct. 16, 1986). Instead, the bill was enacted when "after midnight, the Rules Committee decided to send a bill to you that has never been to committee." 132 Cong. Rec. H10,463 (Oct. 16, 1986) (statement of Rep. Robert F. Smith). Representative Young claimed the Gorge Act was the product of a "midnight rule" and that "this is one of the worst examples of legislating that I have seen in my 14 years." 132 Cong. Rec. H10,464 (Oct. 16, 1986) (statement of Rep. Young).

A. Congress Created the Columbia River Gorge Commission to Enforce the Federal Act

Congress created the Commission, ostensibly out of a combination of state and local governmental appointees and charged it with the duty of enforcing congressional choices in land use planning. 16 U.S.C. § 544c.

The Commission oversees most major land use decisions in the Gorge pending adoption of local land use ordinances. Section 544h. The Secretary retains a veto power over decisions of the Commission. Sections 544d(f)(1), 544f(j), and 544h(c). The Commission can override a secretarial veto with a complex supermajority, but an override has implications for federal funding. Sections 544f(n), 544n. In the event that the Commission fails to abide by the federal design, then the Secretary has the option of encouraging compliance through withholding federal moneys or, under certain circumstances, simply by taking over the process through the use of the Secretary's powers of condemnation. *See, e.g.*, 16 U.S.C. §§ 544g, 544n.

B. The Scheme for Governing Special Management Areas Is Heavily Imbued with Federal Control

The most substantial impacts occur in SMAs. First, the Secretary, not the Commission, develops land use designations throughout the 112,238 acres in SMAs. 16 U.S.C. § 544f(e).

Second, the Secretary, after a formalistic "consultation" with the Commission, establishes all guidelines for SMAs. 16 U.S.C. § 544f(f). These guidelines must be incorporated in toto by the Commission in its mandatory

planning processes. 16 U.S.C. § 544f(f). The planning process must incorporate federally mandated criteria that ban virtually all major development. 16 U.S.C. 544d(d). The federalization of land management planning for an area *with so little federal land* is unique.[3]

Third, in SMAs the local county governments have been "deputized" and are required to adopt local ordinances consistent with the management plan—which for SMAs was promulgated by the Secretary. 16 U.S.C. § 544f(h). After promulgation, the Commission and then the Secretary must approve the ordinances. 16 U.S.C. §§ 544f(i) and (j). The Commission has the option of rewriting the ordinance with secretarial concurrence. 16 U.S.C. §§ 544f(k), (l), and (m). While the Commission may override the Secretary's nonconcurrence with a local ordinance, the ordinance must still be based upon the Act and is subject to secretarial and citizen enforcement for noncompliance with the Act. 16 U.S.C. §§ 544m(b)(1) and (b)(2). An override will also result in the withholding of grant moneys to the recalcitrant county. 16 U.S.C. § 544f(n). Finally, an override will reinvigorate the Secretary's exercise of the power of eminent domain. 16 U.S.C. § 544g(b)(2)(B).

C. There Is Much Federal Control over General Management Areas

The federal government owns only 1.9% of the land within GMAs. Nevertheless, it has imposed federal

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[3] As a comparison, the Sawtooth National Recreation Area contains 96.9% federal land, while the Hell's Canyon National Recreation area contains 94% federal land.

control over land use planning. First, the Commission must adopt land use designations for the entire scenic area, including GMAs. 16 U.S.C. § 544d(b). However, rather than being an exercise of state sovereign power, the adoption of land use designations is controlled by the federal law of the Gorge Act. For example, the statute requires the Commission to designate forest lands, open space, and so on. 16 U.S.C. §§ 544d(b)(3) and (4). In some cases (Urban Areas), the Commission must simply incorporate land use designations previously specified by Congress. 16 U.S.C. § 544d(b)(7).

The Commission must adopt a management plan for the entire scenic area, including GMAs. 16 U.S.C. § 544d(c). Federal law requires that the plan "protect and enhance" resources such as forest lands, open space, and so on. 16 U.S.C. §§ 544d(d)(1) and (3). The Commission is forced to prohibit industrial use in nonurban scenic areas. 16 U.S.C. § 544d(d)(6).

Once the Commission adopts a plan, its lack of sovereign authority becomes manifest. The Secretary must review and concur with the plan. 16 U.S.C. § 544d(f). While the Commission may override the Secretary's veto, it may only do so with a complex supermajority vote and so long as the plan is consistent with the federal Act. 16 U.S.C. § 544d(f)(3). Local counties are also required to adopt local land use ordinances that are in conformance with the plan. 16 U.S.C. § 544e.

D. Pending Adoption of the Management Plan, the Commission Must Enforce the Forest Service's Interim Guidelines

In the beginning, all land use planning required by the Gorge Act was performed by the Secretary through

the Forest Service. 16 U.S.C. § 544h. Pursuant to this authority, the Forest Service drafted "Interim Guidelines" on June 30, 1987, which govern all land use planning outside the "urban areas." A copy of the Final Interim Guidelines (Interim Guidelines) is attached as Appendix E.

Until the management plan and local ordinances are adopted, the Commission is required to follow the Interim Guidelines in all land use decisions. Section 544h. These guidelines had a severe impact upon property owners in the Gorge. For example, in the SMAs and GMAs they prohibited conversion of agricultural land to residential, Interim Guidelines, Ch. III(C)(1)(a)(1); prohibit conversion of forest land to residential, Interim Guidelines, Ch. III(C)(2)(a)(2); prohibit lot line adjustments between neighboring properties if the seller would maintain a residence on a lot that is less than 40 acres, Interim Guidelines Ch. III(C)(6)(a)(1); and prohibit a wide range of other residential and commercial activities, Interim Guidelines, *passim*. Since the record was completed in the case below, the Interim Guidelines have been replaced with a much lengthier Final Management Plan with identical or similar land use restrictions, albeit with more detail attached.

Members of CGU have been denied permits and the ability to utilize their property as a result of the enforcement of the Gorge Act. *See* District Court opinion, Appendix B, at B7-8, B10-11. This injury continues with the final plan.

REASONS FOR GRANTING THE WRIT: THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

As Robert Bork stated in the context of the Constitution's Commerce, Taxing, and Spending Clauses:

> [T]he expansion of Congress's commerce, taxing, and spending powers has reached a point where it is not possible to state that, as a matter of articulated doctrine, there are any limits left. That does not mean, however, that the Court must necessarily repeat its mistake as congressional legislation attempts to reach new subject areas.

Robert H. Bork, *The Tempting of America* 158 (1990). In the rush to "save the Gorge" from ourselves, we have rushed too swiftly over the people of the Columbia River Gorge. This petition is not about protecting the Gorge *from* people, but instead it is about protecting the *people* of the Gorge—their rights, their liberties, their property, and their dreams. This case does not threaten our future generations and their ability to make wise use of the Gorge; rather, it will preserve the rights of all generations—present and future—when they are threatened by expedient rather than reasoned approaches to worthy goals.

Unwilling to trust the local population and local institutions of democracy, Congress arrogated unto itself the power of imposing land use planning on the people of the Gorge. The States of Washington and Oregon, mesmerized by the lure of federal moneys, purported to join together in a federally mandated compact to legitimatize the usurpation of the powers of local government and the individual rights of the people of the Gorge. However, there are certain rights so inalienable, and certain principles of constitutional government so fundamental, that they cannot be apostatized for any amount of federal grant money.

James Madison wrote of the federal government that "its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and

inviolable sovereignty over all other objects." *The Federalist No. 39* (January 16, 1788) at 194 (J. Madison) (Bantam ed. 1982) (The Federalist Papers). The Gorge Act exceeds the outward permissible limits to the federal government's jurisdiction over local governmental affairs.

I

THE NINTH CIRCUIT EXPANDED THE SCOPE OF THE COMMERCE CLAUSE BEYOND CONSTITUTIONAL LIMITS

While CGU's challenge to the Act below demonstrated that *no* enumerated power in the Constitution can justify the federal control over the Gorge as embodied in the Gorge Act, the Ninth Circuit based its decision singularly on its interpretation of the Commerce Clause to the Constitution.

The Ninth Circuit mentioned, but did not reach, CGU's arguments that neither the Property Clause nor the Compact Clause provided the federal government with the authority taken under the Gorge Act. Nor did the Ninth Circuit reach the merits of CGU's arguments that the Gorge Act violated the Tenth Amendment and the Equal Protection Clause.

This case presents a unique opportunity for this Court to clarify whether the Commerce Clause gives Congress the power to regulate activities that have only a slight (or trivial) effect on commerce, when that regulation is not a means to the legitimate end of regulating actual commerce. As Professor Engdahl notes:

> [T]he necessary and proper clause authorizes Congress to make laws respecting subject matters extraneous to those enumerated as its "legitimate" concerns, *insofar as* those laws are reasonably deemed by Congress to be means of

> effectuating federal policy on some enumerated subject.

David E. Engdahl, *Sense and Nonsense About State Immunity*, 2 Constitutional Commentary 93, 98 (1985) (emphasis in original). In the case of the Gorge Act, petitioners believe that local land use planning has only a trivial impact on interstate commerce. Moreover, Congress did not justify *this* regulation as a means to the legitimate end of regulating commerce. Instead, as shown below, Congress stated that the ultimate ends of the Act are twofold: first, the mere preservation of local aesthetic and similar resources and, second, federal involvement in the local economy in order to divert economic growth into urban areas. Without a legitimate enumerated commerce oriented end the regulation as a whole must fail. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584-85 (1985) (O'Connor, J., dissenting). Furthermore, the means chosen, not only is not "necessary and proper" to a legitimate end of regulating commerce, but it also contravenes the spirit of the Constitution, *see id.*, as will be discussed in Part II, *infra*.

The Ninth Circuit found that Commerce Clause jurisdiction extended to local government land use planning within the Gorge because the Gorge is the site of commercial activities such as tourism, logging, and fishing, and because the Gorge is "bisected by a navigable waterway" between two states and therefore "virtually all activities affecting the land, the economy, the environment, or the resources have interstate ramifications." Appendix A at A-7. Furthermore the court found:

> There is thus no merit to the appellant's claim on appeal that by upholding the constitutionality of the Compact, we are upholding the

> authority of Congress to impose zoning regulations throughout the country. As the district court noted, Congress found this area to be one of critical national significance.

Appendix A at A-7.

This goes too far. Just because there is commercial activity located within a region with "interstate ramifications" does not mean that the federal government has jurisdiction to regulate all land use. This was never the intention behind the Constitution. Hamilton, for example, emphatically wrote that "the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." *The Federalist No. 17* (December 5, 1787) at 80.

Likewise, if all Congress had to do is declare an area to be "of critical national significance" in order to obtain Commerce Clause authority over local land use decisions, then there would be no limit whatsoever to federal jurisdiction. As just one example, according to a "Northern Forest Lands Study," which was written by the Forest Service and a governors' task force, 26 million acres of land in New England were found to be nationally significant for economics and recreation. Stephen C. Harper, Laura A. Falk, and Edward W. Rankin, *The Northern Forest Lands Study of New England and New York* at 1 (1990). The report was authorized by Congress in Pub. L. No. 100-446, 1988 U.S. Code Cong. & Admin. News at 102 Stat. 1774, and in reliance on a conference committee report, 134 Cong. Rec. at H6808 (Aug. 10, 1988). Under the Ninth Circuit's interpretation of the Commerce Clause, this would render the entire 26 million acres susceptible to federal land use zoning.

Without doubt, in the past 50 years this Court has discerned that the Commerce Clause gives the federal government broad powers indeed to regulate activities that affect commerce.[4] Surely, however, the federalization of local land use controls takes this process beyond reason and certainly beyond the intent behind the Constitution. If all that Congress must do to assert Commerce Clause jurisdiction is to claim that something is "nationally significant," then there might as well not be any reason to claim that the federal government is limited to its "enumerated powers" only. There would be *no* limits.

The Gorge Act goes beyond the limits set by prior cases which have interpreted the Commerce Clause most broadly. The Commerce Clause was given its most generous interpretation in *Wickard v. Filburn*, 317 U.S. 111 (1942), a case described by Justice Douglas as having reached the "outward limits" of that clause. William O. Douglas, *The Court Years, 1939-1975*, at 50 (1980). Unlike the Gorge Act, however, the Agricultural Adjustment Act of 1938, the statute in *Wickard*, was directly targeted as a means necessary and proper to the regulation of commerce. The language of the 1938 Act expressly addressed how "to avoid surpluses and shortages and the consequent abnormally low or high wheat prices *and obstructions to commerce.*" 317 U.S. at 115 (emphasis added).

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[4] This is not to say that there are no serious misgivings from legal scholars. Richard Epstein, for example, believes that the New Deal expansion of the Commerce Clause resulted from faith in the benevolence of the national government but was based on questionable legal logic. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1449-54 (1987).

As discussed below, no such justification can be found in the Gorge Act, and courts should be reluctant to hypothesize constitutional justifications for statutes where Congress provides no legitimate and clear statement of purpose. That is because the analysis of whether or not a regulation is "necessary and proper" to effectuating the Commerce Clause power is judged on a rational basis test. *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981). If Congress does not delineate with some degree of particularity how a statute is necessary and proper to the regulation of commerce there is little meaning to the rational basis test because Congress has provided nothing that can be judged. *See* Engdahl, *Sense and Nonsense*, 2 Constitutional Commentary at 110 n.68. As this Court has stated on numerous occasions, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); *accord Hafer v. Melo*, 502 U.S. ___, 116 L. Ed. 2d 301, 310 (1991).

In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the constitutionality of the Civil Rights Act of 1964 was upheld, primarily on the basis of the Commerce Clause. Section 201(c) of that Act contained a lengthy description of the nature of activities that were found to affect commerce. The Court had little trouble finding that Congress' regulation of restaurants and hotels was a necessary and proper means to the end of the regulation of commerce. Again, such a justification is not stated in the Gorge Act.

In *Katzenbach v. McClung*, 379 U.S. 294 (1964), the statute at issue involved extensive legislative history of testimony and affidavits submitted to Congress by a multitude of witnesses. This Court held that while Congress

made no formal findings the congressional record was replete with evidence of the burdens placed on interstate commerce by racial discrimination in restaurants. This Court found that the focus of the legislation was to prevent "far-reaching" harm to commerce. 379 U.S. at 301. Relying heavily on the companion *Heart of Atlanta Motel* case, this Court wrote:

> [T]he voluminous testimony [before the Senate and House Committees] presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

379 U.S. at 253.

The present statute, however, is virtually devoid of Commerce Clause justification. It states, in relevant part, that the statute's precatory purpose is:

> (1) to . . . protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and
>
> (2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with paragraph (1).

16 U.S.C. § 544a. Compared to the statutes at issue in *Wickard* and *Heart of Atlanta Motel*, this is a slender reed indeed to justify a statute on the basis of the Commerce Clause. Protecting aesthetics is not the regulation of commerce. Nor is the attempt to divert growth from local rural areas to local urban areas while limiting such growth so that it is consistent with aesthetic and cultural concerns. Furthermore, by claiming to encourage growth, while in fact stifling it, the statute has *not* made any real findings that the legislation is part of Congress' necessary and proper authority to regulate commerce. The *only*

congressional history on the effect of the Gorge Act on commerce shows that such commerce would be stifled. On timber resources alone the United States Forest Service estimated:

> The loss in the allowable cut in the timber resource . . . is 17 million board feet . . . that means [a] direct and indirect job loss of 357 people . . . more than $10 million in direct economic loss would occur every year.

132 Cong. Rec. H10,486 (Oct. 16, 1986) (statement of Rep. Robert F. Smith). Thus, Congress' statement that the Gorge Act will encourage the local economy is unsupported and irrational. This Court, therefore, must review this case to help delineate the limits, if any, of the Commerce Clause.

The District Court[5] cited to several pages of the congressional record to buttress its arguments that Congress saw this as being a statute that affects commerce. *See* Appendix B at B-16. These references are, at best, obliquely related to commerce. The cited passages do not mention the words "impact," "interstate commerce," or refer to "effects on interstate commerce." The goal of this statute was not to deal with commerce but to protect scenery. The justification of "commerce" cannot be bootstrapped onto every realm of human endeavor that may affect commerce in order to justify congressional involvement. The Commerce Clause does not justify congressional use of a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27

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[5] Because the Ninth Circuit failed to analyze these issues, the District Court's analysis will be used as a foil to demonstrate the absence of Commerce Clause jurisdiction.

(1968). *See also* Laurence H. Tribe, *American Constitutional Law*, § 5-7 at 313-14 n.2 (2d ed. 1988).

Even if the limited preamble statement in the Act were construed as being Congress' justification under the Commerce Clause, it does not withstand scrutiny. The proper test for determining whether a statute fits within the auspices of the Commerce Clause was outlined in *Hodel v. Indiana*, 452 U.S. at 323-24:

> A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.

Thus, there must be a nexus between the regulated activity and interstate commerce. Judicial inquiry is limited to discovering whether such a finding of nexus is rational and then to an inquiry over whether the regulatory scheme itself is rational.[6]

In this case, Congress did not claim to be acting under the Commerce Clause and made no findings at all that local land use decisions have any effect on interstate commerce. Even if land use decisions did have an effect on commerce, there is no reasonable connection between

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[6] The District Court, however, interprets the *Hodel* test to be: "A nexus must exist between regulating the development of the Scenic Area and Congress' goal." *See* Appendix B at B-17. This is too facile. Here Congress' goal was "to establish a national scenic area," 16 U.S.C. § 544a(1), which is not the same as promoting commerce. The relationship between a regulated activity and a congressional goal is not the same thing as a relationship between the regulation and commerce.

the commerce end of "encouraging growth" and the means of forbidding development. The notion that the local economy of the Gorge can be supported by stifling development is more than a poor policy choice, it is an insupportable and irrational conclusion. No economic studies were cited by Congress for the oxymoronic proposition that restricting growth encourages growth for the simple reason that none are known to exist. By banning a wide range of activities in SMAs and by forbidding the reasonable use of land throughout the entire scenic area, there can be no question that the local economy will *not* be "encouraged."

Thus, it can be seen that the legislation itself provides no suitable Commerce Clause justification for its foray into local land use planning. Furthermore, even if Congress did try to justify the Act under the Commerce Clause, there is no rational basis between the Act's ends and means.

Neither the Gorge Act nor the legislative history makes such a finding. Furthermore, the Ninth Circuit's discovery that commerce exists in the Gorge cannot justify the Gorge Act's extraordinary regulation--otherwise the federal government could zone every square inch of property in the United States under the theory that the zoning will affect commerce. No court has ever gone this far, and such an argument is not a reason for the courts to abdicate their responsibility to put a limit on the reach of the Commerce Clause. *See* Bork, *The Tempting of America* at 158.

The Gorge Act's claim that its goal is to "protect and support the economy" (consistent with resource protection) is incompatible with the *only* evidence regarding the impact of the Gorge Act which shows that the economy

will be stifled. 132 Cong. Rec. H10,486 (statement of Rep. Robert F. Smith). The rubric of "protect and support the economy" cannot be used as Commerce Clause justification of the statute. There is no rational connection between the regulation of the Gorge and the Gorge Act's only stated goal.

II

THE COLUMBIA GORGE LEGISLATION VIOLATES THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. The Tenth Amendment Is Integral to the Constitution; Many States Ratified the Constitution Only with the Express Recommendation That a Bill of Rights, Including a Version of the Tenth Amendment, Be Enacted

As Justice O'Connor has noted, when discussing the commerce power and the Tenth Amendment, "[i]t is not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution." *Garcia*, 469 U.S. at 585 (O'Connor, J., dissenting). In this case the Gorge Act impugns the meaningful existence of the Tenth Amendment. During the debate over the ratification of our Constitution, there was great concern that the new national government would subsume the sovereignty of the individual states. An overly large and powerful national government, it was feared, would remove the people from direct participation in democratic government, which would ultimately have the potential for tyranny. For example, Brutus feared that

> it will be found that the power retained by individual states, small as it is, will be a clog

> upon the wheels of the government of the United States; the latter therefore will be naturally inclined to remove it out of the way.

Brutus, *Essay I* (October 18, 1787), from *The Anti-Federalist*, § 2.9.9 at 112.

Aware of this trepidation, James Madison tried to reassure the citizens of New York, repeatedly, in *The Federalist Papers*. For example, in *The Federalist No. 39*, he wrote that the new federal government's

> jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.

The Federalist No. 39 (January 16, 1788) at 194 (J. Madison). As to the fear that the people would actually *prefer* the federal government, to the detriment of local authority, Madison wrote:

> But even in that case, the State governments could have little to apprehend, because it is only within a certain sphere, that the federal power can, in the nature of things, be advantageously administered.

The Federalist No. 46 (January 29, 1788) at 239 (J. Madison).

To put the Anti-Federalists' fears to rest once and for all, in 1791 the first ten amendments were ratified by the states, including the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

B. The Columbia Gorge Legislation Violates the Tenth Amendment Under Garcia v. San Antonio Metropolitan Transit Authority

Now that the Tenth Amendment is enshrined in the Constitution, this Court is faced with the question of whether and how to apply it. It is not and never has been expected that the federal government would attempt to negate state sovereignty overnight. Over the years, however, there has been a certain trend to compromise, or minimize, the force of the Tenth Amendment in the face of serious short-term expediency. As Laurence Tribe puts it:

> Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell. The real question, therefore, is this: short of its prohibition of Armageddon, does the Constitution grant the states any judicially enforceable protection from Congress?

Laurence H. Tribe, *American Constitutional Law*, § 5-20 at 381. The answer to Tribe's question is clearly *yes*.

This Court's recent expatiation of the Tenth Amendment found in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, has often been viewed as having cut back on the force of the Tenth Amendment. Nonetheless, the Columbia River Gorge legislation intrudes so far into the field of local legislation that this Court has an opportunity to determine whether *Garcia* precludes a finding that *any* statute can ever be considered violative of the Tenth Amendment because it intrudes too far into local government.

When writing the majority opinion in *Garcia*, Justice Blackmun was persuaded that many of the tests employed by previous courts for discerning the essential elements of state sovereignty were fundamentally flawed and could only lead to inconsistent results which lacked a guiding principle. The error with each of these tests, Justice Blackmun notes, is that because state governments have the legitimate ability to experiment in

> any activity that their citizens choose for the common weal. . . . Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.

Garcia, 469 U.S. at 546. Rather than looking at governmental functions, the Court focused on

> principles of democratic self-governance. . . . If there are to be limits on the Federal Government's power to interfere with state functions—*as undoubtedly there are*—we must look elsewhere to find them.

Garcia, 469 U.S. at 547 (emphasis added). The District Court[7] below concluded that the Tenth Amendment has not been violated because *Garcia* must be read to preclude judicial review of Tenth Amendment claims. The court reasoned that the "political process" protects the states and the states agreed to the scheme in this instance. Appendix B at B-21-22. This is too facile a reading of *Garcia*.

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[7] Other than affirming the District Court decision, and noting the existence of Tenth Amendment arguments, the Ninth Circuit did not address the issue.

First, just because some members of the federal government's congressional delegation from Oregon and Washington supported the legislation does not validate the political process. The Tenth Amendment was not intended to be so easily disregarded through a vote or two from a state's congressional delegation, especially when it is realized that the Tenth Amendment protects more than mere state government.[8] *New York v. United States*, No. 91-543, ___ U.S. ___, 1992 WL 134695, *22-23 (1992).

Second, the "acquiescence" by the States of Washington and Oregon was hardly a model of voluntary contractual agreement—in this country at any rate. The states had absolutely no choice but to surrender to the Act. Not only would substantial grant moneys have been withheld, 16 U.S.C. §§ 544l(e) and 544n(c), but it would have become absolutely impossible for virtually any economic activity to take place in the Gorge. Title 16 U.S.C. § 544l(e)(1) states:

> [I]f the Commission has not been established . . . no new license or new permit . . . shall be issued under authority of *any* Federal law for *any* activity within the scenic area . . . which the Secretary, determines is inconsistent.

(Emphasis added.) For example, to perform virtually any activity within a wetland, a permit is required under

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[8] The language of the Tenth Amendment protects not only the states, but the people: "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, *or to the people*." (Emphasis added.) The rights of the people, as protected in their state constitutions, have been violated as well. Internal affairs of the states are protected from usurpation. *Kansas v. Colorado*, 206 U.S. 46, 49 (1907). *See also The Federalist No. 45* (January 26, 1788) at 233 (J. Madison); and Engdahl, *Sense and Nonsense*, 2 Constitutional Commentary at 94-95.

Section 404 of the Clean Water Act, codified at 33 U.S.C. § 1344. Likewise, ranchers need grazing permits to run cattle on Forest Service land. In fact, there is virtually no significant economic activity left today that does not need some federal permit or license.

In other words, if the states had resisted forming a commission and "joining" the compact, the Secretary would have assumed virtually dictatorial powers over the scenic area, with the authority to impose economic capital punishment through withholding of all proceeds from federal grant programs and the denial of all manner of federal permits. Clearly, this compact was not voluntary, and the intrusion of the federal government into local government is unprecedented and represents an "extraordinary defect[] in the national political process." *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).

C. The Gorge Legislation Improperly Compels State Government to Regulate on Behalf of Federal Interests

This Court's analysis of the Tenth Amendment in *South Carolina v. Baker* recognized that there could be an independent ground for a Tenth Amendment challenge to a federal statute. After finding that the statute in question did not implicate the "structure" of federalism or have a defect in the national political process as outlined in *Garcia*, this Court went on to note that *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 761-64 (1982) (*FERC*),

> left open the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests.

South Carolina, 485 U.S. at 513. Just like the nuclear waste statute in *New York v. United States*, the Gorge Act "directly compels" the precise "manner" in which state and local governments must legislate, in this case with the adoption of land use plans and enactment of zoning ordinances. The states were coerced into a Hobson's choice: accept the "compact" and enforce federal land use controls in contravention to the Tenth Amendment, or suffer economic capital punishment as the federal government condemns property and denies all manner of federal permits in contravention to the Commerce Clause.

D. The Gorge Legislation's Adverse Impact on Our "Republican Form of Government" Implicates a Violation of the Tenth Amendment

Laurence Tribe suggests that the Tenth Amendment's protection of state sovereignty can be conceptualized through reliance on the Constitution's guarantee of a republican form of government. L. Tribe, *American Constitutional Law* at 398. Article IV, Section 4, provides that the "United States shall guarantee to every State in this Union a Republican Form of Government." Tribe argues:

> If courts are once again to take up the task of preserving for states their constitutionally essential role as self-governing polities, the guaranty clause might well provide the most felicitous textual home for that enterprise.

L. Tribe, *American Constitutional Law* at 398.

James Madison saw the new union as being a republic which was partly federal and partly national in character. In *The Federalist No. 39*, Madison criticized the concept of a purely national government and the "*extent* of its powers." *The Federalist No. 39* (January 16, 1788) at 194

(J. Madison) (emphasis in original). In a purely national government, he cautioned, "local authorities are subordinate to the supreme; and may be controuled, directed or abolished by it at pleasure." *Id.* To avoid this possibility, the union is structured so that the local governments—the states—would retain "a residuary and inviolable sovereignty over all other objects." *Id.* Nowhere is there the idea that executive officers of the national government could exercise veto authority over local land use ordinances and legislation. Nowhere is there room for the Columbia River Gorge legislation, because it alters "the form or method of functioning of" local democractic control of land use in violation of the Guarantee Clause. *New York v. United States*, No. 91-543, ___ U.S. ___, 1992 WL 134695, *24-25.

III

THE COLUMBIA RIVER GORGE LEGISLATION CANNOT BE JUSTIFIED UNDER THE PROPERTY CLAUSE

The court below upheld the Gorge Act on the basis of the Commerce Clause and this Court is urged to review the decision as a means of clarifying the meaning of that clause and its interrelationship with the Tenth Amendment. However, it should also be noted that no other enumerated power can justify the Gorge Act. The remainder of this petition shall briefly explain why neither the Property Clause nor the Compacts Clause can support the Act. While the federal government is entitled to protect its property, even if this means restricting activities on state and private land, there must be some limits to this proposition. And if the exercise of fundamental rights might be restricted, the government bears a heavy burden

of justifying a restriction of those rights to protect federal property.[9]

Ownership of a small fraction of the total land acreage in an area hardly gives the owner of the fraction the right to control all uses of all other lands in the geographic region. Yet, this is precisely what Congress is attempting in the Gorge.

The Property Clause's efficacy in protecting federal land was first enunciated in *Camfield v. United States*, 167 U.S. 518 (1897), which involved a violation of the Enclosures Act, and later in *United States v. Alford*, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts [building fires] upon privately owned lands that imperil the publicly owned forests"); and *Kleppe v. State of New Mexico*, 426 U.S. 529, 545 (1976).[10] In these cases, certain principles emerge: The potential harm to federal land must be significant, and there must be some

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[9] Indeed, under the rationale of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the finding of a relationship between the potential harm and the ameliorative regulation that affects private property rights is subject to *heightened* scrutiny. The Court stated:

> We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State *'could rationally have decided'* that the measure adopted might achieve the State's objective."

483 U.S. at 834 (emphasis in original).

[10] According to Professor Engdahl, this exercise of federal jurisdiction over private property can be easily justified as a necessary and proper exercise of Congress' Article IV property power. David E. Engdahl, *State and Federal Power over Federal Property*, 18 Ariz. L. Rev. 283 (1976).

rational relation between the regulation of state and private property and the threat to the federal lands. *See, e.g.*, Ronald F. Frank and John H. Eckhardt, *Power of Congress Under the Property Clause to Give Extraterritorial Effect to Federal Lands Law: Will "Respecting Property" Go the Way of "Affecting Commerce?,"* Vol. XV, No. 4, NAT. RESOURCES LAW. 663 (1983).

No such rationalization can exist in the Columbia River Gorge where the federal government owns only 17% of the landmass.

IV

THE GORGE LEGISLATION CANNOT BE JUSTIFIED AS A COMPACT

The Columbia River Gorge legislation cannot be justified on the ground that it is merely an advance ratification of a compact entered into by the States of Oregon and Washington. First, the Act is federal legislation that imparts substantial authority to the Secretary over local land use planning and legislating and as such violates the Commerce Clause and the Tenth Amendment. These violations cannot be cured by the unusual mechanism of using a "compact." "[T]he departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York v. United States*, No. 91-543, ___ U.S. ___, 1992 WL 134695, *22.

Second, no part of this compact originated with the states. Unlike every other compact previously approved, the states had *nothing* to do with its detail. While there have been instances where Congress granted consent in advance, *see, e.g., Cuyler v. Adams*, 449 U.S. 433 (1981), at least the states filled in the details of the compact.

Such consent by subterfuge has not fared well in other constitutional contexts, such as with the Appointments Clause, United States Constitution, Article II, Section 2, Clause 2, where this Court has ruled that the phrase "by and with the advice and consent of the Senate" limits Congress' power to advice and consent alone. Congress has been explicitly prohibited from nominating and independently appointing officials. *Buckley v. Valeo*, 424 U.S. 1 (1976). Neither can it circumvent the limitation of its Appointments Clause authority to a consent function by allowing the executive to nominate an official with executive powers while retaining control over that official. *Bowsher v. Synar*, 478 U.S. 714, 722-23, 726 (1986).[11]

In a leading article on the Compact Clause by Professors Frankfurter and Landis, the authors wrote:

> The persistence of federalism in this country in substantially its present form, namely, as a Union of States is, we submit, an assured fact. . . . This assumption, at any rate, underlies this paper—the continuance of the States approximately with their present legal autonomy, and not, like the departments of France, mere administrative divisions of the central government.

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[11] *See also* the Treaty Clause, United States Constitution, Art. II, § 2, cl. 2. In *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 319 (1936), this Court held that

> the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

(Emphasis in original.)

Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 687 (1925). Under the Gorge Act, local people and government are mere delegates of federal authority.

CONCLUSION

The Gorge has been in existence for a millennium. It will remain, magnificent and beautiful, for millennia to come. The Constitution has been in existence for 200 years. Because it is a political invention of people, in many ways it is more fragile and delicate than the Gorge. In order for it to retain its vitality for centuries to come, its language and meaning must not be sacrificed for expediency. The prejudices found in the national government against the abilities of local government must not be allowed to rewrite the essential elements of federalism found in the Constitution.

Government of the people and by the people is an essential truth of our constitutional government. As Alexis de Tocqueville wrote "'the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies.'" *FERC*, 456 U.S. at 789 (O'Connor, J., dissenting) (quoting Alexis de Tocqueville, *Democracy in America* 181 (H. Reeve trans. 1961)). The townships and provincial assemblies were never intended to be marionettes of the national government. The Constitution limits the power of the federal government to its enumerated powers only. None of the enumerated powers makes it necessary and proper for agents of the federal government to assume the mantle of local legislators.

With the Gorge Act, this Court has an opportunity to solidify the principles of federalism most recently outlined in *New York v. United States*. This Court can decide whether these are practical limits to the Commerce Clause and whether states can be forced to choose between submitting to excessive federal regulation or enforcing that regulation.

The Gorge will survive. However, in order to ensure the *vitality* of the Constitution, this Court must grant this petition for writ of certiorari to fully consider whether or not the Gorge Act violates the Constitution by its unprecedented assumption of local land use control.

DATED: June, 1992.

Respectfully submitted,

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APPENDIX A*

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLUMBIA RIVER GORGE UNITED-PROTECTING PEOPLE AND PROPERTY, *Plaintiff-Appellant,* v. CLAYTON K. YEUTTER, Secretary of Agriculture of the United States; COLUMBIA RIVER GORGE COMMISSION, *Defendants-Appellees,* FRIENDS OF THE COLUMBIA GORGE, INCORPORATED, *Defendant-Intervenor-Appellee.*	No. 90-35588 D.C. No. CV-88-1319-PA OPINION

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding

Argued and Submitted
September 10, 1991—Portland, Oregon

Filed March 30, 1992

Before: Alfred T. Goodwin, Mary M. Schroeder and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Schroeder

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* Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

COUNSEL

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OPINION

SCHROEDER, Circuit Judge:

This is an action challenging the constitutionality of the Columbia River Gorge Scenic Area Act, 16 U.S.C. §§ 544-544p which was enacted in 1986. Its purposes were to protect the economy and enhance the scenic, cultural, recreational and natural resources of the Columbia River Gorge. The Gorge occupies a uniquely beautiful and rich area in Oregon and Washington bordering the Columbia River. The Act contemplated interim management of the area by the Secretary of Agriculture and long-term management by the Columbia Gorge Commission, an agency to be established by a compact between the two states. 16 U.S.C. § 544c. The Act set forth in some detail the manner in which the Commission was to function and conditioned Congress' consent to the Compact upon compliance with those conditions. The Compact has now

been entered into and the Commission is functioning according to the plan outlined in the Act.

The plaintiffs in this action, individual property owners, an organization called the "Columbia Gorge United - Protecting people and property," and members of that organization, claimed they were adversely affected by the operation of the Commission. They sued both the Secretary of Agriculture and the Commission alleging that the Act violated both the Federal and State Constitutions. Following a hearing on the merits, the district court granted summary judgment in a thoughtful opinion rejecting all of the plaintiffs' claims. Columbia River Gorge United is the sole appellant in this action, as it is the only party below that listed its name on the notice of appeal, thereby complying with the specificity requirement of Fed.R.App.P. 3(c). *See Benally v. Hodel*, 913 F.2d 1464, 1467 (9th Cir. 1990). In this appeal Columbia River Gorge United renews its contentions that the Act violates the United States Constitution, alleging specifically that the Act violates the Tenth Amendment, the Commerce, Property and Compact Clauses and the Fifth Amendment entitlement to equal protection.

Underlying all of appellant's contentions is the recurring theme that the Act and the Compact are contrary to the true wishes of the states of Oregon and Washington, and that the states were coerced into accepting conditions laid down by Congress. The Commission in this case is represented by the Attorneys General of both states who vigorously maintain that both the Act and the Compact were a product of mutual cooperation between federal and state governments to achieve a result satisfactory to both states. To the extent that appellant's arguments rest

upon issues of fact with respect to coercion, they have been resolved against the plaintiffs by the district court in findings which are not clearly erroneous. We therefore deal only with issues of law.

OPERATION OF THE ACT

The Act establishes a "partnership between the Federal Government, the States of Oregon and Washington, and the nearly 50 units of local government within the Columbia River Gorge for the purpose of protecting and enhancing" property and resources within the Gorge. 132 Cong. Rec. 29496 (Oct. 8, 1986) (remarks of Senator Hatfield). The Act accomplishes this goal by creating the Columbia River Gorge National Scenic Area and ratifying an interstate compact between Washington and Oregon which regulates land use and development activities within the Scenic Area.

The Act calls for the creation of a thirteen member Commission composed of three residents appointed by the three Oregon Gorge counties, three residents appointed by the three Washington Gorge counties, three members appointed by each state governor and one nonvoting Forest Service employee appointed by the Secretary of Agriculture. 16 U.S.C. § 544c. Once created, the Commission is charged with the development of a management plan that regulates, through land use ordinances, the development and use of various categories of land within the Scenic Area. In furtherance of this purpose, the Commission is, within the first year of its establishment, to complete a resource inventory, an economic opportunity study, and a recreational assessment of the

Scenic Area. 16 U.S.C. § 544d(a). Withing two years the Commission is to complete land use designations for privately owned land within the Scenic Area. 16 U.S.C. § 544d(b). The Secretary of Agriculture will, during this same period, take corresponding steps with respect to federally owned land within the Scenic Area. 16 U.S.C. § 544f.

Once these tasks are accomplished, the Commission is to develop and adopt a management plan for the Scenic Area. Under the Act, the Plan must include land use designations, management direction for the use of federal land, and guidelines for adoption of land use ordinances. After the Plan is approved by the Secretary of Agriculture, counties will be instructed to submit land use ordinances to the Commission for approval. If a county fails to submit an acceptable plan, the Commission is authorized to develop and implement a county plan that is consistent with the overall management plan.

Under the Act, and the resulting Compact, all land use within the Columbia River Gorge Scenic Area, whether private, federal or local, will be consistent with the management plan developed by the Commission. Congressional consent to this interstate compact is expressly contingent upon inclusion in the compact of all powers and responsibilities assigned to the Commission under the Act. 16 U.S.C. § 544o(d).

The Columbia River Gorge Compact was ratified by Oregon and Washington in 1987. The Compact incorporated the Gorge Act and established the Commission in accordance with the federal statute. Or.Rev.Stat. § 196.150 (1987); Wash.Rev.Code § 43.97.020 (1987).

DISCUSSION

We deal first with the appellant's contentions that the Act violates the authority granted to Congress in both the Commerce and Property Clauses of the Constitution and is therefore outside the scope of the legislative power granted to Congress by the United States Constitution.

The Commerce Clause, Article, I, Section 8, of the Constitution provides that Congress "shall have Power . . . to regulate Commerce with foreign Nations and among the several States." The Clause has, of course, been interpreted expansively to authorize regulation not only of channels and instrumentalities of interstate commerce but of "activities affecting commerce." *See, e.g., Hodel v. Virginia Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 276-277 (1981). Similarly, activity that is seemingly insignificant may be regulated where one individual's "contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn,* 317 U.S. 111, 127-28 (1942). The district court correctly disposed of appellant's contention that the Act goes beyond this expansive power.

The district court found, and appellants do not dispute, that among Congress' concerns was a desire to preserve the beauty of the area for those who would travel to use the rivers and mountains in it for recreation, thus directly causing interstate travel. Congress also intended to regulate competing economic activities within the scenic area that are activities directly affecting interstate commerce. These activities include logging and fishing. Moreover, and perhaps most important, the area itself is unique in that it consists of portions of two states

bisected by a navigable waterway. In such an area, virtually all activities affecting the land, the economy, the environment, or the resources have interstate ramifications. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940) (Congressional authority to regulate rivers is not limited to control for navigation, but is as broad as the needs of commerce and extends to flood protection, watershed development, and the recovery of cost of improvements). *See also Boone v. U.S.*, 944 F.2d 1489, 1492-93 (9th Cir. 1991) (federal government's authority to regulate navigable waters is coextensive with and parallel to expansive power to regulate commerce generally). Interstate bodies of water are frequently the subject of interstate compacts. *See, e.g.*, Tahoe Regional Planning Compact, Pub.L.No. 91-148, 83 Stat. 360 (1969); Delaware River Basin Compact, Pub.L.No. 87-328, 75 Stat. 688 (1961); Upper Colorado River Basin Compact, 63 Stat. 31 (1949). There is thus no merit to the appellant's claim on appeal that by upholding the constitutionality of the Compact, we are upholding the authority of Congress to impose zoning regulations throughout the country. As the district court noted, Congress found this area to be one of critical national significance.

Appellants also contend that the Act goes beyond the grant of authority to Congress under the Property Clause of the Constitution which provides that Congress has power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, Cl. 2. Appellants argue that even though some seventeen percent of the land in the affected area is federally owned, Congress may not regulate development in the

entire area. The district court agreed with appellees that development on non-federally owned land has a sufficient effect on federally owned land to justify regulations of such development under the Property Clause. They relied upon Supreme Court decisions which upheld federal regulation of non-federal land where the regulated activity on the non-federal land affected the activities on the federal land. *See Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976); *Camfield v. United States*, 167 U.S. 518, 525-26 (1897). In addition, the United States points out that it is difficult to see how the entire Act could be struck down by an attack on only those portions affecting non-federal land, since the Act has a severability clause. We need not determine, however, whether all or a portion of the Act would go beyond the reach of Congress' power under the Property Clause. We have already determined that the Act is within Congress' power under the Commerce Clause.

For a similar reason, the Act cannot be a violation of the Tenth Amendment. Since the Act is within the powers granted to Congress under the Commerce Clause, it cannot constitute an exercise of a power reserved to the states. We therefore need not address the federal government's position that the appellants lack standing to assert the rights of the states under the Tenth Amendment.

We then turn to the appellant's contention that the regulatory system is a product of a compact that is not valid under the Compact Clause. Under the Compact Clause, U.S. Const., art. I, § 10, Cl. 3, any interstate agreement that increases the political power of states must be approved by Congress. "The relevant inquiry must be one of impact on [the] federal structure." *United*

States Steel Corp. v. Multistate Tax Comm'n., 434 U.S. 452, 471 (1978). All parties to this appeal agree that the Compact between Washington and Oregon, pursuant to which the Commission was established to oversee the Columbia River Gorge Area, is one which requires such congressional consent. Through the Act, Congress consented in advance to this Compact on the condition that the Compact contain certain specific provisions. Advance consent with requirements attached is itself perfectly valid, as the Supreme Court has held. *Cuyler v. Adams*, 449 U.S. 433, 440-41 (1981). This court has recently reaffirmed that Congress may condition consent upon a compact containing specific terms, including the creation of a compact agency. *See Seattle Master Builders v. Pacific N.W. Elec. Power*, 786 F.2d 1359, 1364 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

The only distinction between *Seattle Master Builders* and this case is the appellant's assertion that this Act specifies in greater detail the provisions of the Compact it authorizes than the Pacific Northwest Power Planning and Conservation Act at issue in *Seattle Master Builders*. The fundamental objection to both this Compact and that in *Seattle Master Builders*, however, is essentially the same. Moreover, there are distinct benefits from the kind of detailed advance planning between states and the federal government that led to this Compact. Such planning is fully consistent with the purpose of the Compact Clause. Regional arrangements may represent a necessary method for handling problems, such as transportation, waste disposal and environmental preservation, which because of their interstate nature cannot be handled by individual states acting alone. Professors Landis and

Frankfurter, in their seminal article on the Compact Clause, strongly recommended the Compact devise for "fashioning new instruments adapted to new situations." Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685, 688 (1925). Foresighted in their thinking, the authors understood that "imaginative adaptation of the compact idea should add considerably to resources available to statesmen in the solution of problems presented by . . . growing interdependence." *Id.* at 729. As we pointed out in *Seattle Master Builders,* the compact has been used in a variety of unique situations to promote both state and federal interests: "An unusual feature of a compact does not make it invalid." *Seattle Master Builders,* 786 F.2d at 1364. The Columbia River Gorge Compact is just such an innovative solution to a difficult interstate land preservation problem.

The appellant finally contends that the Act violates the Fifth Amendment entitlement to equal protection because Gorge area residents must submit to local land use decisions made by non-elected officials, while state residents outside the Gorge area are subject to land use regulation only by elected officials. Insofar as the appellant argues that the Act violates electoral rights guaranteed by the state constitutions or local laws, this challenge fails. When Congress, acting within constitutional limits, creates federal law, state law is nullified to the extent that compliance with both the federal and the state law would be a physical impossibility. *Hillsborough County, Fla. v. Auto Med. Labs.,* 471 U.S. 707, 713 (1985).

The equal protection challenge lodged by the appellant is based upon geographic discrimination. Residents

outside the Gorge area get to vote for their land-use planners, while those inside the Gorge area do not. The equal protection clause, however, is not violated when a geographic area is singled out for different treatment. The Supreme Court has held that "there is no rule that counties, as counties, must be treated alike; the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas.'" *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 230 (1964) (quoting *Salsburg v. Maryland*, 346 U.S. 545, 551 (1954)). Different treatment of different areas is permissible, provided there are reasons for such treatment that do not reflect unconstitutional motivations. *Griffin*, 377 U.S. at 231. Preservation of the Columbia River Gorge Area is a permissible Congressional objective and a valid exercise of the power delegated to Congress under the Commerce Clause of the Constitution.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

COLUMBIA GORGE UNITED-PROTECTING PEOPLE AND PROPERTY, et al.,

Plaintiff,

v.

CLAYTON K. YEUTTER, Secretary of Agriculture of the United States; and the COLUMBIA RIVER GORGE COMMISSION,

Defendants,

and

FRIENDS OF THE COLUMBIA GORGE,

Defendant-Intervenor.

CV No. 88-1319-PA

OPINION

(Filed May 23 90)

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PANNER, J.

Plaintiffs Columbia Gorge United Organization and 19 individuals who own land in the Gorge area bring this action against defendants United States Secretary of Agriculture ("Secretary") and the Columbia River Gorge Commission ("Commission"). Plaintiffs seek a declaration that certain portions of the Columbia River Gorge National Scenic Area Act ("the Gorge Act") are unconstitutional

and an injunction prohibiting defendants from administering the Act. Plaintiffs contend that the Act is unconstitutional because it exceeds the constitutional grant of congressional power, because it violates the commerce clause, the property clause, the compact clause and the appointments clause, because the Gorge Act and the Compact deny electors equal protection of the law, because the Gorge Act denies plaintiffs due process of the law and because the Gorge Act and the Compact violate the supremacy and judicial power clauses of the Constitution. Plaintiffs also request certain members of the Commission be enjoined from deciding contested land development proposals and from implementing the Gorge Act. A court trial was held. I find for the defendants. This opinion comprises my findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

BACKGROUND[1]

Congress enacted the Gorge Act in 1986 and thereby established the Columbia River Gorge National Scenic Area ("the Scenic Area"). 16 U.S.C. § 544, Pub. L. 99-663, 100 Stat. 4302 (1986). The Scenic Area was established to protect and enhance scenic, cultural, recreational, and natural resources, and to protect the economy of the Scenic Area. 16 U.S.C. § 544a. The Act sets boundaries for certain land pockets within the Area, which run along both sides of the Columbia River and in Oregon and Washington. These pockets are designated "urban areas"

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[1] The parties have stipulated to all the facts contained in this section.

("UAs") and "special management areas" ("SMAs") and include both publicly and privately held land. The undesignated parcels are referred to as "general management areas" ("GMAs"). Congress authorized the federal and state governments to promulgate land use plans and laws which regulate land development within the SMAs and GMAs. As of November 17, 1986, when the Gorge Act was enacted, the United States owned approximately 17 percent of Area lands. More than 68 percent of land in the Area was privately owned.

In 1987, Oregon and Washington ratified the Columbia River Gorge Compact ("Compact"), which incorporated the Gorge Act and established the Commission in accordance with the Gorge Act's requirements. ORS 390.420; Wash. Rev. Code § 43.97.020. During May and June 1987, the Governors of Oregon and Washington, and county commissioners within the Scenic Area appointed 12 voting members to the Commission.

The Gorge Act sets forth use and development standards for land within SMAs and GMAs. 16 U.S.C. §§ 544(a), 544d(d)(1)-(9). The Commission, with the Secretary, must then integrate these standards into a Special Area Management Plan ("Plan"). In crafting the Plan, the Secretary is to develop interim guidelines to ensure that the Area's lands are regulated consistently with the Act. 16 U.S.C. § 544f(f). The Forest Service promulgated such guidelines after public involvement and consultation with the Area counties and other agencies. On June 30, 1987, the Secretary issued Final Interim Guidelines ("FIGs").

These FIGs are to stay in effect until the Area counties adopt land use ordinances consistent with the Plan as mandated by the Gorge Act. 16 U.S.C. § 544h(a)(1). The Secretary and Commission must review and approve these ordinances for compliance with the Plan and the Act. If a county's ordinances fail to receive approval or if a county refuses to adopt such ordinances, the Commission enacts ordinances for the county consistent with the Plan. 16 U.S.C. § 544e(b)(1).

During the interim period, the Secretary determines the standards for granting land use proposals. 16 U.S.C. § 544f(f). From the date of the Act's enactment through January 1, 1988, the Secretary, acting through the United States Forest Service, reviewed landowners' use proposals in the Scenic Area. Since January 1, 1988, the Commission has reviewed Scenic Area land use proposals that involve major development action or new residential development. The Commission's primary responsibility under the Act is to review all Area land use proposals that involve major development action or new residential development until the Plan is in place. The Secretary, acting through the United States Forest Service, reviews the balance of Area land use proposals. The Secretary also is authorized to acquire lands within the SMAs.

The individual plaintiffs submitted proposals which were denied by the Commission's Executive Director. The individual plaintiffs had not used their land to grow forest products or to produce farm commodities, but the Commission considered plaintiffs' property as either agricultural or forest land. Although residential development is a permitted use for plaintiffs' lands under applicable county zoning ordinances, the Commission denied

the proposals because they sought to convert agricultural or forest lands to rural residential land, in contravention of the Act.

Plaintiffs Barbara Lee Hayes, Charles Kyer, Marilyn McCall, Twila Rothrock, Keith Johnson, and Norris Johnson own land within an SMA. Plaintiff Willard Gaul owns land within an SMA and had his land use proposal to construct a residence denied by the Forest Service. The Forest Service sent an opinion letter to Gaul advising him that the development he proposed was inconsistent with the purposes of the Act.

Plaintiffs Richard Miller and Roberta Miller own land within an GMA. Plaintiffs Jack Kapp, David Kapp, Shirley Azure, Johnny Olson, Russell Pollard, LaDonna Pollard, Richard Templin, Ellen Templin, and Frank Windust own land within GMAs and had their respective residential development land use proposals denied by the Commission Executive Director ("Director"). Plaintiff Cynthia Williams owns land within an GMA and had her land use proposal approved by the Director. The Director eventually approved the Pollards' resubmitted application with conditions.

The Commission heard appeals from plaintiffs whose proposals had been denied by the Director. At these hearings, the Commission voted to affirm the Director's denials of plaintiffs' development proposals, except in the Windust's case, in which the Commission reversed. When the Commission affirmed the Director's decisions, the Commission voted unanimously to affirm in all but two instances. The Commission voted 9-1 to affirm the Director's decision to deny Templin's development proposal

and 6-5 to affirm the Director's decision to deny the Pollards' development proposal.

At these contested case hearings, the Director defended the position taken in his order, pursuant to a rule adopted by the Commission on November 14, 1988. At three hearings, an Oregon Assistant Attorney General was present as legal counsel for the Commission.

The Act entitles land owners whose development proposals were denied by the Commission to appeal to state court. 16 U.S.C § 544m. Plaintiffs have not sought review of the Commission's decisions to deny their proposal in state court. The United States has not purchased or condemned any of plaintiffs' land.

The Act provides that individuals who use or seek to use their lands in a manner inconsistent with the Act may be subject to civil penalties or to having the government acquire their land. 16 U.S.C. § 544m(a)(3).

Columbia Gorge United Organization—Protecting People and Property ("CGU") is a nonprofit corporation whose members primarily are private landowners in Area counties. The corporate purpose of CGU is "to organize a united effort to oppose federal control of the Columbia Gorge." Stipulation no. 13. CGU bylaws mandate that each CGU Board Director be an owner of residential property within the Area. Several, but not all, of the plaintiffs are CGU members. CGU does not own any land within the Area.

Friends of the Columbia Gorge ("Friends"), an organization "which was a moving force in initiating and obtaining passage" of the Gorge Act, has intervened in

this action as of right. Stipulation no. 24. Its members do not participate in determining the policy of the organization other than to confirm prospective Board members.

Director Richard Benner, Chairperson Stafford Hansell, and Commission members Don Clark, Dave Cannard, and Barbara Bailey are former Friends members. Three Commission members served on the Friends Board, two are Friends founders, one has a spouse who was a member, and one has a spouse who served on the Board until January 1989 and who still is a member. Cannard contributed to Friends in addition to paying annual dues and made an interest-free loan to Friends in the amount of approximately $11,000 in 1986. Friends paid the loan back on November 10, 1988.

All Commission members have resigned from Friends as of October 1988. Members Clark, Cannard, Hansell, and Bailey resigned their memberships after a motion was filed with the Commission on September 26, 1988 to disqualify them from presiding at quasi-judicial hearings in which Friends had participated as an interested party. These same four members did not announce their connection with Friends or withdraw from serving on appeals to the Commission from the Director's denials of four of plaintiffs' development proposals.

The Pacific Legal Foundation ("PLF") and the National Inholders' Association ("NIA") are amici curiae, in support of plaintiffs' position.

Plaintiffs seek a declaration that the Gorge Act, the Compact, and various regulations and guidelines promulgated under the Act and the Compact violate the United

States, Oregon, and/or Washington Constitutions. Plaintiffs also seek an injunction prohibiting implementation and administration of the Gorge Act and the Compact, all of which the Commission acted under in ruling on the proposals.

DISCUSSION

A. STANDING

Before the court considers the merits of a constitutional claim, the plaintiffs must demonstrate that they have standing as required by Article III of the United States Constitution. *Valley Forge College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1981). "At an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Id.* at 472 (omitting quotes). To demonstrate standing the plaintiffs must establish that: 1) a personal injury exists or is threatened, 2) the injury is fairly traceable to the challenged action and 3) the injury is likely to be redressed by a favorable decision. *Id.*

1. Injury or Threat of Injury Caused by the Gorge Act.

The individual plaintiffs own land in one of the three areas covered by the Act, and either the Director or the Commission has denied plaintiffs' requests for proposed uses of their property. The Commission denied plaintiffs' use of their land as they intended to use it, and they may

be forced to sell their property to the federal government. If the plaintiffs use their land inconsistently with the Act they are subject to civil penalties. 16 U.S.C. § 544m(a)(3). The plaintiffs, thus, have been injured or are threatened to be injured by the implementation of the Gorge Act.

Columbia Gorge United Organization--Protecting People and Property ("CGU") is a nonprofit corporation whose members primarily are private landowners in Area counties. A membership organization has standing as a representative of its members. *Warth v. Seldin,* 422 U.S. 490, 511 (1975). "The organization must allege that the members are suffering immediate or threatened injury as a result of the challenged action." *Id.* CGU bylaws mandate that each CGU Board Director own residential property within the Area. Several, but not all, of the individual plaintiffs/landowners are CGU members. CGU's members are directly affected by the Act and they individually have the potential to be injured or have been injured by the enforcement of the Act.

2. Relief

Plaintiffs request the court to declare the Act unconstitutional and enjoin the Commission from enforcing the Act. If the Act is declared unconstitutional then plaintiffs will be free to make use of their property in accordance with general state and local zoning laws. Residential development is permitted under the local zoning laws; thus plaintiffs could develop their land as they desired. Plaintiffs' requests for relief will redress their injuries, and thus they have standing to bring their claims.

3. Takings Claim

The defendants specifically assert that the plaintiffs' takings claim is not ripe for review. Plaintiffs assert that the Act took a scenic easement on their land without requiring just compensation. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Planning Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172, 191 (1985).

The federal government has not taken any land. By the passage of the Act the United States is not vested with all rights, title, and interest in any land in the Gorge that is not already the property of the United States. *Cf.* Redwood National Park Act, 16 U.S.C. § 79c(b) (1968). The Gorge Act and the Compact permit the United States to take property only after a lengthy procedural process. 16 U.S.C. § 544e-h.

Before the Secretary can take lands in an SMA, by purchase or condemnation, the Commission must review the landowners development proposal and declare it inconsistent with the Act. 16 U.S.C. §544g(a)-(b). The land owner is entitled to appeal the Commission's decision to state court. The federal or state government may purchase the land or bring an action for condemnation. The land owner also can assert his rights in the United States Claims Court once the federal government has purchased or condemned the property. Tucker Act, 28 U.S.C. § 1491.

Plaintiffs have not exhausted their administrative or judicial remedies and have not received compensation for

land that the Commission declares inconsistent with the Act. *See Williamson County Planning Comm'n*, 473 U.S. at 194-195. I find that because the federal government has not denied plaintiffs just compensation, and the plaintiffs have not appealed to state court or used the process provided by the Tucker Act, 28 U.S.C. § 1491, their takings claims are not ripe for review.

B. VIOLATION OF THE TENTH AMENDMENT

Plaintiffs contend that when Congress enacted the Gorge Act, Congress exceeded its powers enumerated in the United States Constitution. The tenth amendment reserves powers to the states that are not delegated to the United States by the Constitution. U.S. Const. amend. X. Plaintiffs assert that the power to enact zoning laws is vested in the states and the municipalities and not in the federal government, and that local zoning is outside the scope of the congressional enumerated powers. Plaintiffs thus assert that the Gorge Act, the Final Interim Guidelines and the Compact impose zoning on private land and violate the tenth amendment.

1. The States' Powers

Plaintiffs imply that the Gorge Act completely usurps the states' right to enact zoning laws. Congress or the federal agencies, however, do not directly dictate the zoning laws to the private property owners. The Gorge Act establishes criteria and guidelines to advance Congress' goal to preserve and enhance the scenic, cultural, recreational and natural resources of the Gorge, 16 U.S.C.

§ 544d, and provides federal assistance in enforcing the Gorge Act. Oregon and Washington and the local governments primarily enforce the Gorge Act through the Plan and local ordinances.

When Oregon and Washington enacted the interstate compact, the states voluntarily agreed to the congressional standards. 16 U.S.C § 544o(d); ORS 390.415; Rev. Wash. Code § 43.97A. The governors of Oregon and Washington appoint members of the Commission. The Commission members adopt the final version of the management plan and the Commission rules on whether a private landowner's proposed use of land within GMAs and SMAs is consistent with the management plan. The counties enact zoning laws that are consistent with the management plan, the Compact, and the Gorge Act. If the counties do not adopt land use ordinances consistent with the Gorge Act the Commission will enact ordinances consistent with the Plan and the Compact. Oregon and Washington, who act through the Commission, and local governments continue to enforce the zoning laws.

The federal government has limited authority to regulate zoning and development in the Scenic Area. If the state or local governments do not enact ordinances consistent with the Gorge Act, the Secretary has only the authority to withhold funding granted to the states for development consistent with the Congress' goal of protecting the Scenic Area. 16 U.S.C. §§ 544i(b), 544n(c). Only during the interim period, the federal government determines the standards for which developmental proposals are consistent with the Gorge Act. 16 U.S.C. §§ 544h, 544m. Once the Compact was formed and the laws regarding the Gorge are enacted, the federal government

manages only land within the SMAs. 16 U.S.C. §§ 544f, 544g(a)(1). The United States can also obtain injunctive relief or withhold funding from violators of the Gorge Act. 16 U.S.C. §§ 544m(b)(5)(A) & 544n(C). Oregon and Washington continue to enact and regulate zoning laws. Congress has not usurped Oregon's and Washington's power to regulate private land use, but sets guidelines for the states to follow. Congress has not violated the tenth amendment.

2. Implied Congressional Powers

Plaintiffs then assert that constitutional powers, implied or direct, do not exist that authorize Congress to carry out the Gorge Act. Congress has implied powers which are necessary and proper to carry into effect its enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819).

a. Commerce Clause

Plaintiffs contend that the Gorge Act is beyond the scope of the commerce clause because residential land use is immobile and local, and thus does not affect interstate commerce.

Plaintiffs first assert that since Congress did not make any findings that zoning private land in the National Scenic Area was necessary to regulate interstate commerce, Congress cannot derive its power through the commerce clause. Congress, however, need not make specific findings in the Act. *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964). As in *Katzenbach*, while debating

the act at issue, Congress considered the impact the act would have on interstate commerce. *See* 132 Cong. Rec. H11121-22 (daily ed. Oct. 16, 1986) (statements of Reps. AuCoin and Wyden); 132 Cong. Rec. S15636 (daily ed. Oct. 8, 1989) (statements of Sen. Hatfield).

The Gorge Act is constitutional under the commerce clause if a rational basis exists for finding that the regulated activity affects interstate commerce and the means by which Congress regulates the activity are reasonably adapted to Congress' goal. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77 (1981). The activity that Congress regulates does not have to move through interstate commerce; it only has to affect interstate commerce. *Fry v. United States*, 421 U.S. 542, 547 (1975).

The legislative record supports a finding that the establishment of a national scenic area affects interstate commerce. First, by enacting the Gorge Act, which was adopted by an interstate compact between the states of Washington and Oregon, Congress intended to protect the scenic, cultural, recreational, and natural resources of the Gorge. People from all over the world come to Oregon and Washington to enjoy the beauty of the Gorge and use the rivers and mountains for recreation, including windsurfing, hiking, bicycle riding, and dining. *See* 132 Cong. Rec. S15637 (Oct. 8, 1986) (Senator Hatfield). Second, Congress intended to regulate the competing economic interest in the Scenic Area. 132 Cong. Rec. S15637-39 (Oct. 8, 1986) (testimony concerning the timber industry and protecting anadromous fisheries and the regional fishing economy). Finally, the Scenic Area includes two states bisected by a navigable waterway.

Rational basis clearly exists for finding that the establishment of the Scenic Area affects interstate commerce.

A nexus must exist between regulating the development of the Scenic Area and Congress' goal. *Hodel*, 452 U.S. at 276. Congress specified that the purpose of the Gorge Act is

> (1) to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational and natural resources of the Columbia River Gorge; and
>
> (2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing further economic development . . .

16 U.S.C. § 544. Congress achieves its goals through the involvement of federal, state and local government instrumentalities in enforcing the Gorge Act. 16 U.S.C. § 544-544p (1987). To protect the Gorge and its economy, Congress has divided the Columbia Gorge into three management areas and the federal and state governments approve any development plans within the SMAs or GMAs. Local zoning laws continue to control property development in the Urban Area.

The SMAs have the most significant scenic and cultural values and have been subject to developmental pressure from private land owners. Blair, *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 Envtl L. 863, 934 (1987). The SMAs are protected by Forest Service management, by the Forest Service's acquisition powers and by the Commission's authority to disapprove of any development. GMAs

include land that need protection but the protection is not as crucially important as the lands within the SMAs. *Id.* The protection is achieved through the Commission's approval of property development. The exemption of the UAs plan enhances the economy of the cities and towns within the Scenic Area.

The complex management plan, which includes studies of the Gorge and resource inventory, land use designation and adoption of a comprehensive plan by the state and local authorities creates more than a reasonable nexus to achieving Congress' goals. Congress acted within the scope of its constitutional power through the commerce clause when it enacted the Gorge Act.

b. Property Clause

Plaintiffs next contend that the management plan violates the property clause. The property clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Congress may regulate privately and state owned lands if the regulations are necessary to protect the federal lands and navigable waters. *Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976)(citing *Camfield v. United States*, 167 U.S. 518, 525-26 (1897)); *United States v. Alford*, 274 U.S. 264, 267 (1927); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979).

Plaintiffs contend that because the federal government owns only 17% of the total Scenic Area it does not own enough land to establish a rational basis for zoning non-federal land. Plaintiffs' argument is faulty. First, the

federal government does not exclusively zone the Scenic Area but the states and local governments enact zoning laws that are consistent with the Gorge Act. Second, the federal government primarily regulates the SMAs and the United States owns a substantial amount[2] of the land in the SMAs.

The Forest Service has the authority to manage the land within the SMAs, to acquire property within the SMAs, and the Secretary has the authority to obtain injunctive relief or other relief from violators of the Gorge Act if state or local government instrumentalities do not act consistently with the Gorge Act. 16 U.S.C. §§§ 544g(a)(1), m(b)(1), m(b)(5)(A). As I found above, the Gorge Act, through the Forest Service and the Secretary, protect the land within the Scenic Area—federal, state and private land--from threats to the natural, scenic beauty, and the natural resources. The Forest Service or Congress has not acted beyond the scope of the property clause.

c. The Compact Clause

Plaintiffs next contend that Congress "bootstrapped" its legislative authority for the Gorge Act with the compact clause. Congress must consent to a compact between two states when the activity in the compact affects the federal sphere, U.S. Const. art. I, §10, cl. 3, but Congress cannot confer its powers through the compact clause. *Seattle Master Builders v. Pacific N.W. Elec. Power*, 786 F.2d

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[2] The federal government owns 42,102 acres out of 112,328 acres of land in the SMA.

1359, 1374 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987). Since I have found that Congress had authority to enact the Gorge Act through the commerce clause and through the property clause, plaintiffs' argument that defendants bootstrapped their authority to enact the Gorge Act through the compact clause does not have any merit.

The Pacific Legal Foundation ("PLF"), Amicus Curiae, additionally argues that the Compact is not valid because Congress coerced Oregon and Washington into approving the compact. PLF contends that the states did not take part in formulating the Compact and Congress created a detailed scheme that the state had no choice but to accept. Thus, PLF argues that the Compact is unconstitutional.

Congress can consent to a compact prior to the states agreeing to the compact, *id.* at 1364, and can specify conditions precedent to congressional consent. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 281-282 (1959). The Compact, here, is similar to the compact in *Seattle Master Builders*, where four states adopted a compact to create an interstate council. 786 F.2d at 1374. In *Seattle Master Builders*, Congress specified the provisions for the creation and the operation of an interstate council. *Seattle Master Builders*, 786 F.2d at 1372; *see* 16 U.S.C. § 839b. The congressional act required the council to prepare a regional conservation plan which conformed to a list of federal standards. *Id.* The Ninth Circuit held the Compact valid. *Id.*

Similarly, the Gorge Act sets forth specific requirements that the commission must follow prior to Congress

consenting to the Compact. For example, the states' land use ordinance must be consistent with the enumerated use and development standards for land within SMAs and GMAs set forth in the Gorge Act. 16 U.S.C. §§ 544d(d)(1)-(9). The states also must create a commission and the Commission, in cooperation with the Secretary, must then integrate these standards into a Scenic Area Management Plan. However, the Act did not require Oregon and Washington to enact the Compact. The states were free to reject the conditions of the Compact. Instead Oregon and Washington established a Commission and agreed to a compact which incorporated the terms of the Gorge Act. The states were not coerced into agreeing to the Compact. The Compact is valid.

d. Constitutional Amendment

Plaintiffs argue that the Gorge Act and the Compact amend the United States Constitution. Congress had the power to enact the Gorge Act through the commerce clause and the property clause and Congress properly exercised its right to consent to a valid compact. Therefore, Congress has not amended the Constitution by enacting the Gorge Act.

C. DENIAL OF STATES' RIGHTS

Plaintiffs' arguments that the Gorge Act usurps the democratic process and the plaintiffs' electors' right to franchise are without merit. Plaintiffs contend that their electors were denied the right to approve or reject, by vote, the local government apparatus and the right to

initiate and refer for a county vote local land use ordinances. The states, through their democratic process and their electors, agreed to the Compact, created the Commission and were authorized to enact zoning laws. 16 U.S.C. §§ 544c(a)(1)(A) & (B) and 544e(b)2, f(h)(2). The states also have not been denied the right to participate in the national political process and have not been singled out. *See Garcia v. San Antonio Metro Transit*, 469 U.S. 528, 555 (1985); *South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988). Congress did not violate the tenth amendment or deny plaintiffs' electors equal protection.

D. DENIAL OF DUE PROCESS

1. Procedural Due Process

Plaintiffs further assert that the Gorge Act, the Final Interim Guidelines and the Compact do not provide landowners with prior notice, a hearing or a forum to contest the National Scenic Area Management Plan. They claim that defendants are limited to quasi-judicial reviews of land use proposals. Plaintiffs' claim is without merit and is not ripe for review.

First, the Act provides for public comment and participation. The Gorge Act states that "the Secretary and the Commission shall conduct public hearings and solicit public comment prior to final adoption of the management plan and the Commission shall conduct public hearings and solicit public comment prior to final adoption of land use ordinances." 16 U.S.C. § 544d(e). In addition, the Gorge Act and the Compact provide for judicial review of any final actions of a county, of the Commission, or of the Secretary, which relates to the implementation of the Act

and of any land use ordinance or interim guideline adopted under the Act. *Id.*; 16 U.S.C. § 544m(b)(4). Further, the Commission's Plan is not in final form and the public will be entitled to additional notice and comment. Plaintiffs have not been denied any procedural due process of the law.

2. Substantive Due Process

Plaintiffs next argue that the Gorge Act is unconstitutionally vague as applied to the development of privately owned land within the Scenic Area but outside the Urban Area. The Act prohibits residential developments outside the Urban Area that "adversely affect" the scenic, cultural, recreational, and natural resources of the National Scenic Area. 16 U.S.C. § 544d(d)(8). Plaintiffs contend that "adversely affect" is ambiguous and the defendants must speculate as to the Act's application.

A statute is void for vagueness if its terms are not described with sufficient definiteness so that ordinary people can understand what conduct is prohibited, and if it is understood in a manner that encourages arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The term "adversely affect" in itself is understandable when read in the context of the Gorge Act. It means development that will harm the scenic beauty or natural resources of the Scenic Area. The Gorge Act also applies other standards for determining if the land development will adversely affect the Gorge. *See* 16 U.S.C. §§ 544(a), 544d(j), 544(l) and 544d(d). For example, section 544(a) defines adversely affects as "a reasonable likelihood of more than moderate adverse

consequences for the scenic, cultural, recreation or natural resources of the scenic area . . . " The Secretary has also developed interim guidelines and the Commission has enacted administrative rules. The term "adversely affect" is clearly defined and the plaintiffs have not been denied substantive due process.

3. Administrative Due Process

a. Bias

Plaintiffs also contend that the court should enjoin Commission members who have been members of Friends of the Columbia Gorge from participating in quasi-judicial hearings because due process requires impartial decision making. The defendants assert that none of the Commission members are currently members of the Friends of Columbia River and the Board is not biased.

Due process requires an impartial decision-maker, even if the adjudication is administrative and informal. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Plaintiffs have the burden to prove that the decision-makers partially decided the case, which is shown through a financial or personal stake. *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702-3 (1948). It is not a denial of due process for a judge or an administrative law judge to decide a case after the judge expressed an opinion on the issue in a case. *Id.* In *Cement*, the Court found that the plaintiff was not denied procedural due process when the ALJ had testified at a congressional hearing that was contrary to the plaintiffs' positions.

Here, plaintiffs allege primarily that the Commission members are biased because they were members of Friends of the Columbia River. One board member, Dave Cannard, made a loan to Friends which Friends paid back on November 10, 1988. The loan does not create a financial interest in the plaintiffs' appeals to the Commission. Plaintiffs have not demonstrated any financial or personal stake the Commission members have in the outcome of the case and the Commission members' are not biased just because they may have personal views. *See id.*

b. Washington's Statutory Disqualifications of a Judge

Plaintiffs also contend that Washington's "appearance of fairness rule" applies and that the members' association with the FCG violates this statute. *See* RCW 42.36.060. The statute, however, applies only to ex parte contact, which did not occur here.

The Washington conflict of interest statute, which applies here, disqualifies a judge from decision making when the judge has a pecuniary interest. RCW 42.18.160. Agency personnel are not disqualified for having formed opinions regarding matters at issue. The Commission members are not biased either under the United States Constitution or Washington's laws.

c. Exclusion of the Director from Contested Appeals

Plaintiffs next request the court to enjoin the Executive Director from involvement in contested appeals on

developmental proposals because he performs three different roles: judge, witness and attorney. Plaintiffs argue that Oregon Revised Statute 183.450(8) prohibits the executive director from giving legal arguments and giving legal advice to the Commission. An agency member may represent the agency if the agency and the attorney general give the director permission. ORS 183.450(9). If permission is not given the party claiming that the ruling should be reversed must demonstrate that the agency member was prejudiced. *Id.* On November 14, 1988, the Commission permitted the executive director to represent the Commission, and on October 28, 1988, the Oregon Attorney General permitted the executive director to represent the Commission.

Some of the plaintiffs' appeals occurred prior to permission being granted by the Attorney General. The plaintiffs, however, have not shown that the Director substantially prejudiced their cases as required by the statute. *See* ORS 183.450(9). Since the Commission and the Attorney General ratified the executive director's appearance after the plaintiffs' appeals, I find that the plaintiffs' decision should not be reversed and the commission is not enjoined from having the executive director represent it.

E. VIOLATION OF THE APPOINTMENTS CLAUSE

Even though plaintiffs have argued that their constitutional rights have been violated because zoning is a state or local issue and state administrative statutes should apply, plaintiffs argue that the Gorge Act violates the appointments clause. U.S. Const. art. II, § 2, cl. 2.

Plaintiffs assert that the Commission is a federal agency and the President of the United States should appoint the members of the Commission. Plaintiffs further assert that the Commission is a federal agency because the Commission administers and enforces the Gorge Act on private land owners.

Similar to the case at bar, in *Seattle Master Builders*, 798 F.2d at 1359, the petitioners argued that if the council is a valid compact agency, the appointments clause requires the members to be appointed by the President of the United States and not the governors of the states. The Ninth Circuit disagreed, stating that "[t]he appointments clause is addressed to the separation of powers between the President and Congress. No court has yet held that the appointments clause prohibits the creation of an interstate planning council with members appointed by the state." *Seattle Master Builders*, 786 F.2d at 1365.

The appointments clause applies to: 1) all executive officers; 2) who serve pursuant to federal law; 3) and who serve with significant authority over federal governmental actions. Oregon and Washington enacted laws pursuant to the Gorge Act and the Commission enforces the laws pursuant to the Compact and the states' laws. "As with any compact, congressional consent did not result in the creation of the compact but only authorized the creation of the compact organization and the appointment of its officials. The appointment, salaries and direction of the Council members are state derived." *Id.* at 1365. As in *Seattle Master Builders*, I need not reach the first and third element because the plaintiffs did not prove the second element. I find that the commission acts

pursuant to Oregon and Washington laws; therefore, the compact did not violate the appointments clause.

Plaintiffs also contend that since the Commission is a federal and not a state agency, the defendants should be acting pursuant to federal law and that the landowners are denied due process and equal protection of the law. They assert that the landowners in the GMA are denied access to the federal court on appeal of the Commission's denial of a proposal. As I have found that the commission is a state agency and acts pursuant to state law, the plaintiffs are not entitled to a review of the Commission's decisions in federal court. Further, there is no requirement that federal court have jurisdiction "so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process." *Yakus v. United States*, 321 U.S. 414, 444 (1944).

The judicial review which the Gorge Act sets forth satisfies due process. The Gorge Act and the Compact specify that jurisdiction over appeals or challenges to Commission or county action be placed in state courts, while providing jurisdiction to review action taken by the Secretary in federal district court. 16 U.S.C. § 544m(b)(4)-(6). Congress has the power to define and limit the jurisdiction of federal courts. *Lauf v. E.G. Skinner & Co.*, 303 U.S. 323, 330 (1938). Since all challenges to the Commission or county actions are pursuant to state law and the Secretary's actions are pursuant to federal law, a rational basis exists for judicial review in state court for an appeal from the Commission and rational basis exists for judicial review in federal court for review of the Secretary's actions. Plaintiffs have not been denied due process of the law.

F. ADMINISTRATIVE RULE 350-20-002(12) and 350-20-004(2)

Lastly, plaintiffs allege that the Commission should be enjoined from using administrative rule 350-20-002(12) and 350-20-004(2) because the Commission unlawfully amended the Final Interim Guidelines. The Commission expanded the definition of residential development to include "any alteration to the exterior deemed significant to the Commission or its designee." Adm. Rule 350-20-002-(12). The Commission also amended the FIGs' definitions of agricultural land to include land suitable for production of farm commodities, Amd. Rule 350-20-004 (2)(a), and farm land to include land capable of producing in excess of twenty cubic feet per acre per year of merchantable tree species. Adm. Rule 350-20-004(2)(b).

Plaintiffs allege that until the management plan is in effect the FIGs apply to any proposed development outside the Urban Area. The Gorge Act authorizes the Commission only to develop guidelines for inclusion in the management plan to be adopted by the counties in the Scenic Area and the Commission acted without authority when it amended the definitions enumerated above.

Defendants contend that Section 544h(c) gives the Commission authority to amend the FIGs during the interim period. Section 544h(c) provides that during the interim period

> [t]he Commission shall review all proposals for major development actions and new residential development in such county in the scenic area, except urban area. The commission shall allow

> major development actions and new residential development only if it determines that such development is consistent with the standards contained in section 554d of this title and the purposes of sections 544 to 544p.

16 U.S.C. § 544h(c). This Section is ambiguous as to whether the Commission must follow the FIGs exactly. Section 544h(c) only states that the Commission must find that the development is not consistent with the standards set forth in the Gorge Act.

The defendant/Commission correctly states that the proper question here is whether the rules are consistent with the Gorge Act itself. Wide discretion is given to administrative agencies when they interpret the law. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). The court must determine if the Commission abused its discretion and whether the adopted rules are unreasonable and inconsistent with the Act. *Id.* at 843.

The Commission's definition of residential development does not expand Congress's definition. "Alteration to the exterior" is only a more detailed and clearer definition of "construction of any residence or other related major structure." I find that the Commission's definition is consistent with the Gorge Act.

The Commission definition of agricultural land is no different than Congress'. *See* 16 U.S.C. § 544d(b)(2). Finally I find that the definition of farm land is not inconsistent or unreasonable because the Commission clarified the definition of farm land. Considering that much of the land in the Columbia Gorge contains forest

products, it is necessary to set clear standards for determining when land is capable of being used as a farm product. I find that the Commission did not abuse its discretion by setting forth more detailed definitions of the developments restricted by the Gorge Act.

CONCLUSION

I find that the plaintiffs did not have standing to assert a takings claim and that the Columbia River Gorge Scenic Act and the Compact are constitutional. Congress, the Commission, and the counties acted within the authority of the United States Constitution, the law of the United States and the Oregon and Washington Constitutions and laws. Plaintiffs are denied declaratory and injunctive relief.

DATED this 23 day of May 1990.

/s/ Owen M. Panner
OWEN M. PANNER,
United States
District Court Judge

APPENDIX C

United States Constitution, Article I

Section 10, Clause 3. Duty on Tonnage, State Compacts, War

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

United States Constitution, Article II

Section 2, Clause 2. Treaty Making Power; Appointing Power

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

United States Constitution, Article IV

Section 3, Clause 2. Public Lands

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. Republican Government

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government; and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

United States Constitution

AMENDMENT X—RESERVED POWER TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX D

16 U.S.C.

§ 544. Columbia River Gorge National Scenic Area: definitions

As used in sections 544 to 544p of this title, the term—

(a) "adversely affect" or "adversely affecting" means, except as used in section 544m of this title, a reasonable likelihood of more than moderate adverse consequences for the scenic, cultural, recreation or natural resources of the scenic area, the determination of which is based on—

(1) the context of a proposed action;

(2) the intensity of a proposed action, including the magnitude and duration of an impact and the likelihood of its occurrence;

(3) the relationship between a proposed action and other similar actions which are individually insignificant but which may have cumulatively significant impacts; and

(4) proven mitigation measures which the proponent of an action will implement as part of the proposal to reduce otherwise significant affects to an insignificant level;

(b) "agricultural lands" means lands designated as agricultural lands pursuant to section 544d of this title;

(c) "Commission" means the Columbia River Gorge Commission established pursuant to section 544c of this title;

(d) "counties" means Hood River, Multnomah, and Wasco Counties, Oregon; and Clark, Klickitat, and Skamania Counties, Washington;

(e) "Dodson/Warrendale Special Purchase Unit" means the Dodson/Warrendale Special Purchase Unit established pursuant to section 544b of this title;

(f) "forest lands" means lands designated as forest lands pursuant to section 544d of this title;

(g) "Indian tribes" means the Nez Perce Tribe, the Confederated Tribes and Rands of the Yakima Indian Nation, the Confederated Tribes of the Warm Springs of Oregon, and the Confederated Tribes of the Umatilla Indian Reservation;

(h) "interim guidelines" means any interim guidelines developed by the Secretary pursuant to section 544h of this title, and any amendment, revision, or variance;

(i) "land use ordinance" or "ordinance" means any ordinance adopted by a county or by the Commission pursuant to sections 544 to 544p of this title, and includes any amendment to, revision of, or variance from such ordinance;

(j) "major development actions" means any of the following:

(1) subdivisions, partitions and short plat proposals;

(2) any permit for siting or construction outside urban areas of multifamily residential, industrial or commercial facilities, except such facilities as are included in the recreation assessment;

(3) the exploration, development and production of mineral resources unless such exploration, development or production can be conducted without disturbing the surface of any land within the boundaries of a special management area or is for sand, gravel and crushed rock used for the construction, maintenance or reconstruction of roads within the special management areas used for the production of forest products; and

(4) permits for siting or construction within a special management area of any residence or other related major structure on any parcel of land less than forty acres in size;

(k) "management plan" means the scenic area management plan adopted pursuant to section 544d of this title;

(l) "open spaces" means unimproved lands not designated as agricultural lands or forest lands pursuant to section 544d of this title and designated as open space pursuant to section 544d of this title. Open spaces include—

(1) scenic, cultural, and historic areas;

(2) fish and wildlife habitat;

(3) lands which support plant species that are endemic to the scenic area or which are listed as rare, threatened or endangered species pursuant to State or Federal Endangered Species Acts;

(4) ecologically and scientifically significant natural areas;

(5) outstanding scenic views and sites;

(6) water areas and wetlands;

(7) archaeological sites, Indian burial grounds and village sites, historic trails and roads and other areas which are culturally or historically significant;

(8) potential and existing recreation resources; and

(9) Federal and State wild, scenic, and recreation waterways;

(m) "recreation assessment" means the recreation assessment adopted pursuant to section 544d of this title;

(n) "residential development" means the permitting for siting or construction of any residence or other related major structure;

(o) "scenic area" means the Columbia River Gorge National Scenic Area established pursuant to section 544b of this title;

(p) "Secretary" means the Secretary of Agriculture;

(q) "special management areas" means areas within the scenic area established pursuant to section 544b of this title;

(r) "States" means the States of Oregon and Washington; and

(s) "urban areas" means those areas within the scenic area identified as urban areas on the map referred to in section 544b(e) of this title or within the boundaries of an urban area as revised pursuant to section 544b(f) of this title.

(Pub.L. 99-663, § 2, Nov. 17, 1986, 100 Stat. 4274.)

§ 544a. Purposes

The purposes of sections 544 to 544p of this title are—

(1) to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and

(2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with paragraph (1).

(Pub.L. 99-663, § 3, Nov. 17, 1986, 100 Stat. 4276.)

§ 544b. Establishment of scenic area

(a) Boundaries

(1) There is hereby established the Columbia River Gorge National Scenic Area.

(2) The Boundaries of the scenic area shall be generally depicted on the map entitled "Boundary Map, Columbia River Gorge National Scenic Area," numbered NSA-001 sheets 1 and 2, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service.

(b) Special Management Areas

(1) The following areas within the boundaries of the scenic area are hereby designated "Special Management

Areas": Gates of the Columbia River Gorge; Wind Mountain; Burdoin Mountain; and Rowena.

(2) The boundaries of the special management areas designated in this section—

(A) shall be generally depicted on the map entitled "Special Management Areas, Columbia River Gorge National Scenic Area", numbered SMA-002 sheets 1 through 17, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service; and

(B) shall include all islands within the boundaries of the scenic area.

(c) Revision of Special Management Area boundaries

The Secretary, in consultation with the Commission, may make minor revisions in the boundaries of special management areas after publication of notice to that effect in the Federal Register and submission of notice thereof to the Committee on Energy and Natural Resources of the United States Senate and the Committees on Agriculture and Interior and Insular Affairs of the United States House of Representatives. Such notice shall be published and submitted at least sixty days before the revision is made. Notice of final action regarding such revision shall also be published in the Federal Register.

(d) Dodson/Warrendale Special Purchase Unit

(1) There is hereby established the Dodson/Warrendale Special Purchase Unit.

(2) The boundaries of the Dodson/Warrendale Special Purchase Unit shall be generally depicted on the map entitled "Dodson/Warrendale Special Purchase Unit, Columbia River Gorge National Scenic Area", numbered SPU-003 sheet 1, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service.

(e) Urban Areas

(1) The following cities and towns are hereby designated as "Urban Areas": Cascade Locks, Hood River, Mosier, and The Dalles, Oregon; and Bingen, Carson, Dallesport, Home Valley, Lyle, North Bonneville, Stevenson, White Salmon, and Wishram, Washington.

(2) The boundaries of urban areas shall be generally depicted on the map entitled, "Urban Areas, Columbia River Gorge National Scenic Area", numbered UA-004 sheets 1 through 11, and dated September 1986, which shall be on file and available for public inspection in the offices of the Commission and of the Chief, Forest Service. The boundaries of urban areas designated in this subsection may be revised pursuant to the provisions of this section.

(f) Revision of Urban Area boundaries

(1) Upon application of a county and in consultation with the Secretary, the Commission may make minor revisions to the boundaries of any urban area identified in subsection 4(e) of this section. A majority vote of two-thirds of the members of the Commission, including a

majority of the members appointed from each State, shall be required to approve any revision of urban area boundaries.

(2) The Commission may revise the boundaries of an urban area only if it finds that—

(A) a demonstrable need exists to accommodate long-range urban population growth requirements or economic needs consistent with the management plan;

(B) revision of urban area boundaries would be consistent with the standards established in section 544d of this title and the purposes of section 544 to 544p of this title;

(C) revision of urban area boundaries would result in maximum efficiency of land uses within and on the fringe of existing urban areas; and

(D) revision of urban area boundaries would not result in the significant reduction of agricultural lands, forest lands, or open spaces.

(Pub.L. 99-663, § 4, Nov. 17, 1986, 100 Stat. 4276.)

§ 544c. Columbia River Gorge Commission

(a) Establishment and membership of Commission

(1) To achieve the purposes of sections 544 to 544p of this title and to facilitate cooperation among the States of Oregon and Washington, and with the United States of America, the consent of Congress is given for an agreement described in sections 544 to 544p of this title pursuant to which, within one year after November 17, 1986—

(A) the States of Oregon and Washington shall establish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission, and shall incorporate sections 544 to 544p of this title by specific reference in such agreement. The Commission shall carry out its functions and responsibilities in accordance with the provisions of the interstate agreement and of sections 544 to 544p of this title and shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law;

(B) the States of Oregon and Washington shall provide to the Commission, State agencies, and the counties under State law the authority to carry out their respective functions and responsibilities in accordance with the provisions of paragraph (1)(A) of this subsection; and

(C) the States of Oregon and Washington shall appoint members of the Commission as provided in clauses (i) through (iii), subject to applicable State law: *Provided*, That the Governor of either State may extend the time for appointment of Commission members ninety days to provide more time for the States and counties to make such appointments. Membership of the Commission shall be as follows:

(i) six members, comprised of one resident from each of the following counties: Hood River, Multnomah, and Wasco Counties, Oregon, and Clark, Klickitat, and Skamania Counties, Washington, to be appointed by the governing body of each of the respective counties: *Provided*, That in the event the governing body of a county fails to make such appointment, the Governor of

the State in which the county is located shall appoint such member;

(ii) three members who reside in the State of Oregon, at least one of whom shall be a resident of the scenic area, to be appointed by the Governor of Oregon;

(iii) three members who reside in the State of Washington, at least one of whom shall be a resident of the scenic area, to be appointed by the Governor of Washington; and

(iv) one ex officio, nonvoting member who shall be an employee of the Forest Service, to be appointed by the Secretary.

(2) The agreement shall take effect and the Commission may exercise its authorities pursuant to the agreement upon the appointment of four initial members from each State, subject to applicable State law, and the date of such an agreement shall be the date of establishment of the Commission. Such agreement is hereby consented to by the Congress.

(3) Either State or any county may fill any vacancy occurring prior to the expiration of the term of any member originally appointed by the State or county. Each member appointed to the Commission shall serve a term of four years, except that, with respect to members initially appointed pursuant to paragraph (1)(C)(i), each Governor shall designate one member to serve for a term of five years and one to serve for a term of six years, and one member from each State initially appointed pursuant to paragraph (1)(C)(ii) and (iii) shall be designated by the Governor to serve a term of five years, and one to serve a term of six years. Neither the Governors nor the governing bodies of any of the counties may appoint Federal,

State, or local elected or appointed officials to the Commission.

(4) a majority of the members of the Commission shall constitute a quorum. The members of the commission shall select from among themselves a Chairman by majority vote of the members appointed from each State.

(5) Except for the ex-officio member appointed pursuant to paragraph (1)(c)(iv), the members and officers and employees of the Commission shall not be officers or employees of the United States for any purpose. The Commission shall appoint, fix compensation for, and assign and delegate duties to such officers and employees as the Commission deems necessary to fulfill its functions under sections 544 to 544p of this title. The compensation of Commission members shall be fixed by State law. The compensation of Commission members, officers, and employees and the expenses of the Commission shall be paid from funds provided to the Commission by the States.

(b) Applicable law

For the purposes of providing a uniform system of laws, which in addition to sections 544 to 544p of this title, are applicable to the Commission, the Commission shall adopt regulations relating to administrative procedure, the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Commission, advisory committees, and disclosure of information consistent with the more restrictive statutory provisions of either State. Regulations applicable to financial disclosure under this subsection shall be applied to members of the

Commission without regard to the duration of their service on the Commission or the amount of compensation received for such service. No contract, obligation, or other action of the Commission shall be an obligation of the United States or an obligation secured by the full faith and credit of the United States.

(c) Assistance to Commission

Upon the request of the Commission, the Secretary and other Federal agencies are authorized to provide information, personnel, property, and services on a reimbursable basis, and the Secretary is authorized to provide technical assistance on a nonreimbursable basis, to the Commission to assist it in carrying out its functions and responsibilities pursuant to sections 544 to 544p of this title.

(d) Advisory committees

The Commission shall establish voluntary technical and citizen advisory committees to assist the Commission in carrying out its functions and responsibilities pursuant to sections 544 to 544p of this title.

(Pub.L. 99-663, § 5, Nov. 17, 1986, 100 Stat. 4277.)

§ 544d. Scenic area management plan

(a) Studies

Within one year after the date the Commission is established, it shall, in cooperation with the Secretary,

complete the following studies for use in preparing the management plan:

(1) Resource inventory

The Commission shall complete a resource inventory. The resource inventory shall—

(A) document all existing land uses, natural features and limitations, scenic, natural, cultural, archaeological and recreation and economic resources and activities: *Provided*, That the location of any Indian burial grounds, village sites, and other areas of archaeological or religious significance shall not be made public information and such information shall be used for administrative purposes only; and

(B) incorporate without change the resource inventory developed by the Secretary pursuant to section 544f of this title for the special management areas.

(2) Economic opportunity study

The Commission shall complete a study to identify opportunities to enhance the economies of communities in the scenic area in a manner consistent with the purposes of sections 544 to 544p of this title.

(3) Recreation assessment

The Commission shall complete an assessment of recreation resources and opportunities for enhancement of these resources. The recreation assessment shall—

(A) designate the location and specify the construction of an interpretive center or other appropriate facility, to be located in the State of Oregon, and of a conference center or other appropriate facility, to be located in the State of Washington;

(B) identify areas within the scenic area that are suitable for other public use facilities, including but not limited to educational and interpretive facilities, campsites, picnic areas, boat launch facilities and river access areas; and

(C) subject to the treaty and other rights of Indian tribes, designate areas to provide increased access for recreation purposes to the Columbia River and its tributaries; and

(D) incorporate without change the recreation assessment developed by the Secretary pursuant to section 544f of this title for the special management areas.

(b) Land use designations

Within two years after the Commission is established, it shall develop land use designations for the use of non-Federal lands within the scenic area. The land use designations shall—

(1) be based on the results of the resource inventory developed pursuant to subsection (a)(l) of this section, and consistent with the standards established in subsection (d) of this section;

(2) designate those lands used or suitable for the production of crops, fruits or other agricultural products or the sustenance of livestock as agricultural lands;

(3) designate lands used or suitable for the production of forest products as forest lands;

(4) designate lands suitable for the protection and enhancement of open spaces;

(5) designate areas in the scenic area outside special management areas used or suitable for commercial development: *Provided,* That such designation shall encourage, but not require, commercial development to take place in urban areas and shall take into account the physical characteristics of the areas in question and their geographic proximity to transportation, commercial, and industrial facilities and other amenities;

(6) designate areas used or suitable for residential development, taking into account the physical characteristics of the areas in question and their geographic proximity to transportation and commercial facilities and other amenities; and

(7) incorporate without change the designation of urban areas established in section 544b(e) of this title.

(c) Adoption of management plan

Within three years after the date the Commission is established, it shall adopt a management plan for the scenic area. The Commission shall adopt the management plan by a majority vote of the members appointed,

including at least three members from each State. The management plan shall—

(1) be based on the results of the resource inventory developed pursuant to subsection (a)(l) of this section;

(2) include land use designations developed pursuant to subsection (b) of this section;

(3) be consistent with the standards established in subsection (d) of this section;

(4) incorporate without change the management direction for the use of Federal lands within and the land use designations for the special management areas adopted by the Secretary pursuant to section 544f of this title; and

(5) include guidelines for the adoption of land use ordinances for lands within the scenic area. The guidelines—

(A) shall incorporate without change the guidelines for the development of special management area land use ordinances developed by the Secretary pursuant to section 544f of this title; and

(B) shall not apply to urban areas designated in section 544b(e) of this title.

(d) Standards for management plan

The management plan and all land use ordinances and interim guidelines adopted pursuant to sections 544 to 544p of this title shall include provisions to—

(1) protect and enhance agricultural lands for agricultural uses and to allow, but not

require, conversion of agricultural lands to open space, recreation development or forest lands;

(2) protect and enhance forest lands for forest uses and to allow, but not require, conversion of forest lands to agricultural lands, recreation development or open spaces;

(3) protect and enhance open spaces;

(4) protect and enhance public and private recreation resources and educational and interpretive facilities and opportunities, in accordance with the recreation assessment adopted pursuant to subsection (a) of this section;

(5) prohibit major development actions in special management areas, except for partitions or short plats which the Secretary determines are desirable to facilitate land acquisitions pursuant to sections 544 to 544p of this title;

(6) prohibit industrial development in the scenic area outside urban areas;

(7) require that commercial development outside urban areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the scenic area; and

(8) require that residential development outside urban areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the scenic area; and

(9) require that the exploration, development and production of mineral resources, and the reclamation of lands thereafter, take place without adversely affecting the scenic, cultural, recreation and natural resources of the scenic area.

(e) Agency consultation and public involvement

The Secretary and the Commission shall exercise their responsibilities pursuant to sections 544 to 544p of this title in consultation with Federal, State, and local governments having jurisdiction within the scenic area or expertise pertaining to its administration and with Indian tribes. The Secretary and the Commission shall conduct public hearings and solicit public comment prior to final adoption of the management plan and the Commission shall conduct public hearings and solicit public comment prior to final adoption of land use ordinances. The Commission and the appropriate county shall promptly notify the Secretary, the States, local governments and Indian tribes of all proposed major development actions and residential development in the scenic area.

(f) Concurrence of management plan

(1) Review by Secretary

Upon adoption of the management plan, the Commission shall promptly submit the plan to the Secretary for review. If the Secretary agrees with the Commission that the management plan is consistent with the standards established in this section and the purposes of sections 544 to 544p of this title, the Secretary shall concur to that effect. Should the Secretary fail to act on the proposed plan within ninety days, the Secretary shall be deemed to have concurred on the management plan.

(2) Denial of concurrence

If concurrence is denied, the Secretary shall state the reasons for finding the plan is inconsistent with the standards established in this section or the purposes of sections 544 to 544p of this title, and shall submit to the Commission suggested modifications to the management plan to make it consistent with such standards and the purposes of sections 544 to 544p of this title.

(3) Commission reconsideration

Within one hundred and twenty days after receipt of notification of non-concurrence, the Commission shall—

(A) revise and resubmit the plan to the Secretary; or

(B) by a vote of two-thirds of its membership, including a majority of the members appointed from each State, reject the suggested modifications of the Secretary and adopt a management plan consistent with the provisions of this section and the purposes of sections 544 to 544p of this title.

(g) Revision of plan

No sooner than five years after adoption of the management plan, but at least every ten years, the Commission shall review, the management plan to determine whether it should be revised. The Commission shall submit any revised management plan to the Secretary for review and concurrence, in accordance with the provisions of this section for adoption of the management plan.

(h) Amendment of plan

If the Commission determines at any time that conditions within the scenic area have significantly changed, it may amend the management plan. The Commission shall submit amendments to the management plan to the Secretary for review, in accordance with the provisions of this section for adoption of the management plan.

(Pub.L. 99-663, § 6, Nov. 17, 1986, 100 Stat. 4279.)

§ 544e. Administration of scenic area

(a) Management of scenic area

The non-Federal lands within the scenic area shall be administered by the Commission in accordance with the management plan and sections 544 to 544p of this title.

(b) Adoption of scenic area land use ordinances.

(1) Within sixty days of initial receipt of the management plan, each county shall submit to the Commission a letter stating that it proposes to adopt a land use ordinance consistent with the management plan. If any county fails to submit such letter or fails to adopt a land use ordinance as provided in this section, the Commission shall carry out the requirements of subsection (c) of this section.

(2) Within two hundred and seventy days of receipt of the management plan, each county shall adopt a land use ordinance consistent with the management plan, and thereafter may adopt an amendment, revision or variance

to a land use ordinance at any time. Each county upon adoption of a land use ordinance shall promptly submit the ordinance to the Commission.

(3) Approval by Commission

(A) Within ninety days after receipt of a land use ordinance, the Commission, by majority vote including at least three members from each State, shall approve the ordinance unless it determines the ordinance is inconsistent with the management plan. Should the Commission fail to act within ninety days the ordinance shall be deemed to be approved.

(B) If approval is denied, the Commission shall state the reasons for finding the ordinance is inconsistent with the management plan, and shall submit to the county suggested modifications to the ordinance to make it consistent with the management plan.

(C) Each county shall have ninety days after it receives recommendations from the Commission to make modifications designed to eliminate the inconsistencies and to resubmit the ordinance to the Commission for approval. The Commission shall have sixty days to approve or disapprove the resubmitted ordinance. Any resubmitted ordinance shall become effective upon approval. Should the Commission disapprove the resubmitted ordinance, it shall promptly resubmit the ordinance for reconsideration. Should the Commission fail to act within sixty days, the ordinance shall be deemed to be approved.

(c) Commission land use ordinances

(1) Within ninety days after making a determination that a county has failed to comply with the provisions of this section, the Commission shall make and publish a land use ordinance setting standard for the use of non-Federal lands in such county within the boundaries of the national scenic area excluding urban areas identified in section 544b(e) of this title. The ordinance shall have the object of assuring that the use of such non-Federal lands is consistent with the management plan. The ordinance may differ amongst the several parcels of land within the boundaries of the scenic area. The ordinance may from time to time be amended by the Commission.

(2) Subsequent compliance

In the event the Commission has promulgated regulations pursuant to this section, a county may thereafter upon written notice to the Commission elect to adopt a land use ordinance, in which event it shall comply with the provisions of this section for adoption of a land use ordinance. Upon approval of a land use ordinance by the Commission it shall supersede any regulations for the county developed by the Commission, subject to valid existing rights.

(d) Construction of facilities

The Secretary is hereby authorized to design, construct, operate and maintain such facilities as are included in the recreation assessment.

(Pub.L. 99-663, § 7, Nov. 17, 1986, 100 Stat. 4282.)

§ 544f. Administration of special management areas

(a) Administration of Federal lands

(1) The Secretary shall administer Federal lands within the special management areas in accordance with sections 544 to 544p of this title and other laws, rules and regulations applicable to the national forest system. In addition, the construction of roads and the management, utilization and harvest of timber on Federal lands within the special management areas also shall be subject to Forest Service visual resource management guidelines. The Secretary shall utilize lands acquired through exchange in calculating the allowable sales quantity on the Gifford Pinchot and Mount Hood National Forests.

(b) Withdrawal of Federal lands

Subject to valid existing rights, all Federal lands located in the special management areas are hereby withdrawn from all forms of entry, appropriation, or disposal under the public land laws, from location, entry, and patent under the mining laws of the United States, and from disposition under all laws pertaining to mineral and geothermal leasing: *Provided,* That the Secretary may allow the exploration, development, or production of sand, gravel, and crushed rock as necessary to construct, maintain, or reconstruct roads in the special management areas.

(c) Resource inventory

The Secretary shall complete a resource inventory for the special management areas consistent with the process

and substance of the inventory prescribed by section 544d(a)(l) of this title.

(d) Recreation assessment

Within two years after November 17, 1986, the Secretary shall complete an assessment of recreation resources in the special management areas and opportunities for enhancement of these resources. The recreation assessment shall—

(1) identify areas within the special management areas suitable for designation by the Commission pursuant to section 544d of this title for the construction of an interpretive center or other appropriate facility, to be located in the State of Oregon, and of a conference center or other appropriate facility, to be located in the State of Washington;

(2) identify areas within the special management areas suitable for other public use facilities, including but not limited to educational and interpretive facilities, campsites, picnic areas, boat launch facilities, and river access areas; and

(3) subject to the treaty or other rights of Indian tribes, identify areas with the special management areas suitable for use to increase access for recreation purposes to the Columbia River and its tributaries.

(e) Land use designations

Within three years after November 17, 1986, the Secretary shall develop land use designations for the special management areas. The land use designations shall be--

(1) based on the resource inventory prepared by the Secretary pursuant to this section; and

(2) consistent with the standards established in section 544d of this title.

(f) Guidelines for land use ordinances

(1) Within three years after November 17, 1986, the Secretary shall, in consultation with the Commission, develop guidelines to assure that non-Federal lands within the special management areas are managed consistent with the standards in section 544d of this title and the purposes of sections 544 to 544p of this title. The Secretary shall promptly transmit the guidelines to the Commission for inclusion in the management plan. The guidelines shall require that management utilization, and disposal of timber, and exploration, development, and production of sand, gravel, and crushed rock for the construction, maintenance, or reconstruction of roads used to manage or harvest forest products on non-Federal lands within the special management areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the scenic area.

(h)[1] Adoption of special management area land use ordinances

(1) Within sixty days of receipt of the management plan, each county shall submit to the Commission a letter stating that it proposes to adopt a land use ordinance consistent with the management plan. If any county fails to submit a letter as provided in this subsection, or fails to adopt a land use ordinance as provided in this section, the Commission shall carry out the requirements of subsection (*l*) of this section.

(2) Within two hundred and seventy days of receipt of the management plan, each county shall adopt a special management area land use ordinance consistent with the management plan, and thereafter may adopt an amendment, revision or variance to a land use ordinance at any time. Each county upon adoption of a special management area land use ordinance shall promptly submit the adopted ordinance to the Commission.

(i) Review by Commission

(1) The Commission shall review the special management area land use ordinance received from each county, and within ninety days after receipt shall make a tentative determination as to whether the ordinance is consistent with the management plan. If the Commission makes a tentative determination that the land use ordinance is consistent with the management plan, the Commission shall send the ordinance to the Secretary for concurrence.

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[1] So in original. No subsec. (g) was enacted.

(2) If the Commission makes a tentative determination that the land use ordinance is inconsistent with the management plan, the Commission shall state the reasons for the determination and shall return the ordinance to the appropriate county with suggested modifications required for consistency with the management plan.

(3) Each county shall have ninety days after it is notified by the Commission to make modifications designed to eliminate the inconsistencies and to resubmit the ordinance to the Commission for tentative determination of consistency. The Commission shall have sixty days to make a tentative consistency determination on the resubmitted ordinance. If found consistent, the land use ordinance shall be transmitted by the Commission to the Secretary for concurrence that the ordinance is consistent with the management plan. If the Commission finds the resubmitted ordinance inconsistent, the Commission shall adopt an ordinance pursuant to subsection (*l*) of this section.

(j) Concurrence by Secretary; denial of concurrence

(1) Upon receipt of a special management area land use ordinance from the Commission, the Secretary shall notify the public of such receipt and shall, within ninety days thereafter, concur with the Commission's tentative determination of consistency with the management plan unless the Secretary determines the ordinance is inconsistent. Any ordinance submitted to the Secretary shall become effective upon notification of concurrence. Should the Secretary fail to act within ninety days, the

Secretary shall be deemed to have concurred with the Commission's tentative consistency determination.

(2) If concurrence is denied, the Secretary shall state the reasons therefor and shall submit to the Commission suggested modifications to the land use ordinances to make them consistent with the management plan and the purposes of sections 544 to 544p of this title.

(k) Commission reconsideration

Upon receipt of notification of non-concurrence by the Secretary, the Commission shall resubmit the land use ordinance to the appropriate county. Such county shall within ninety days, reconsider and revise the ordinance and resubmit the ordinance to the Commission for reconsideration in accordance with the provisions of this section. Should the Secretary again deny concurrence, the Commission shall either prepare a land use ordinance for such county pursuant to subsection (*l*) of this section or, by a two-thirds vote of the membership of the Commission including a majority of the members appointed from each State, determine that the ordinance is consistent with the management plan.

***(l)* Commission Ordinances**

(1) Within ninety days after making a determination that a county has failed to comply with the provisions of subsection (h) of this section, the Commission shall make and publish an ordinance setting standards for the use of non-Federal lands of such county within the boundaries of the special management areas. The ordinances shall

have the object of assuring that the use of such lands is consistent with the management plan. The ordinances may differ amongst the several parcels of land within the boundaries of the special management areas. The ordinances may from time to time be amended by the Commission.

(2) The Commission shall promptly submit the ordinance to the Secretary. The Secretary shall, within ninety days after receipt of the ordinance from the Commission, concur with the tentative determination that the land use ordinance is consistent with management plan unless a determination of inconsistency is made. Any ordinance submitted to the Secretary shall become effective upon concurrence. Should the Secretary fail to concur within ninety days, the land use ordinance shall be effective.

(3) If concurrence is denied, the Secretary shall state the reasons for finding the ordinance is inconsistent with the management plan, and shall submit to the Commission suggested modifications to the ordinance to make it consistent with the plan.

(4) The Commission shall have ninety days after it receives recommendations from the Secretary to make modifications designed to eliminate the inconsistencies and to resubmit the ordinance to the Secretary for concurrence. The Secretary shall have sixty days to concur with the resubmitted ordinance. Any resubmitted ordinance shall become effective upon concurrence by the Secretary. Should the Secretary deny concurrence for the resubmitted ordinance, the Secretary shall state the reasons therefor and shall promptly resubmit the ordinance for reconsideration. Should the Secretary fail to concur

within sixty days, the ordinance shall be deemed effective.

(5) Within one hundred and twenty days after receipt of notification of non-concurrence, the Commission shall—

(A) revise and resubmit the land use ordinance to the Secretary; or

(B) by a vote of two-thirds of its membership, including a majority of the members appointed from each State, reject the suggested modifications of the Secretary and adopt a land use ordinance consistent with the provisions of this section and the purposes of sections 544 to 544p of this title.

(m) Subsequent compliance

In the event the Commission has adopted an ordinance pursuant to this section, the affected county may thereafter, upon written notice to the Commission and to the Secretary, elect to adopt a special management area land use ordinance, in which event it shall comply with the provisions of this section for adoption of special management area land use ordinances. Upon concurrence of such land use ordinances by the Secretary, they shall supersede any special management area land use ordinances for the county development by the Commission, subject to valid existing rights.

(n) Effect of Secretary's non-concurrence

If the Secretary does not concur in any land use ordinance approved or adopted by the Commission pursuant to this section, the availability of certain funds to the relevant county shall be governed by section 544n(c) of this title.

***(o)* Special rules**

Any ordinance adopted pursuant to this section shall not apply to any parcel or parcels of land within a special management area if, after the date such ordinance has been adopted, three years have elapsed after a landowner has made a bona fide offer to sell at fair market value or otherwise convey such parcel or parcels to the Secretary, unless the affected landowner agrees to an extension of the three year period: *Provided,* That an offer shall not be considered bona fide if the landowner refuses consideration equal to the fair market value as appraised in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions (Interagency Land Acquisition Conference, 1973). Lands for which an ordinance is suspended pursuant to this subsection shall be subject to the relevant scenic area land use ordinance adopted pursuant to section 544e of this title.

(Pub. L. 99-663, § 8, Nov. 17, 1986, 100 Stat. 4283.)

§ 544g. Land acquisition

(a) Acquisition authorized

(1) The Secretary is authorized to acquire any lands or interests therein within the special management areas and the Dodson/Warrendale Special Purchase Unit which the Secretary determines are needed to achieve the purposes of sections 544 to 544p of this title: *Provided,* That any lands, waters, or interests therein owned by either State or any political subdivision thereof may be acquired only by donation or exchange.

(2) Lands within the State of Oregon acquired by the Secretary pursuant to sections 544 to 544p of this title shall become part of the Mount Hood National Forest. Lands within the State of Washington acquired by the Secretary pursuant to this section shall become part of the Gifford Pinchot National Forest. All lands acquired by the Secretary pursuant to sections 544 to 544p of this title shall be subject to the laws and regulations pertaining to the National Forest System and sections 544 to 544p of this title.

(b) Limitations on eminent domain

(1) Where authorized in subsection (a) of this section to acquire land or interests therein without the consent of the owner, the Secretary shall—

> (A) acquire only such land or interests therein as is reasonably necessary to accomplish the purposes of sections 544 to 544p of this title; and

(B) do so only in cases where all reasonable efforts to acquire with the consent of the owner such lands, or interests therein, have failed.

(2) Notwithstanding the provisions of subsection (a) of this section, the Secretary may not acquire without the consent of the owner lands or interests therein which—

(A) on November 17, 1986, were used primarily for educational, religious, or charitable purposes, single-family residential purposes, farming, or grazing so long as the existing character of that use is not substantially changed or permitted for change;

(B) are located in counties with land use ordinances in which the Secretary has concurred pursuant to section 544f of this title, unless such lands are being used, or are in imminent danger of being used, in a manner incompatible with such ordinances;

(C) are within the boundaries of the Dodson/Warrendale Special Purchase Unit; or

(D) are owned by an Indian tribe, held in trust by the United States for an Indian tribe or member of an Indian tribe, or otherwise administered by the United States for the benefit of an Indian tribe or member of an Indian tribe.

(c) Hardship cases

In exercising authority to acquire lands pursuant to this section the Secretary shall give prompt and careful consideration to any offer made by any person or entity owning any land, or interest in land, within the boundaries of a special management area. In considering such

offer, the Secretary shall take into consideration any hardship to the owner which might result from any undue delay in acquiring the property.

(d) Land exchanges

(1) The Secretary is authorized and directed, in conformance with the provisions of this subsection, to acquire by exchange any parcel of unimproved forest land at least forty acres in size within the boundaries of the special management areas which is owned by any private forest land owner if, after enactment of this Act but within one hundred and eighty days after final adoption of the management plan, such private forest land owner offers to the United States such parcel of forest land.

(2) In exercising this authority to acquire forest lands pursuant to this subsection, the Secretary may accept title to such lands and convey to the owner federally owned lands deemed appropriate by the Secretary within the States of Oregon and Washington, regardless of the State in which the transferred lands are located. Forest lands exchanged pursuant to this subsection shall be of approximately equal value: *Provided,* That the Secretary may accept cash from or pay cash to the grantor in such an exchange in order to equalize minor differences in the values of the properties exchanged: *Provided further,* That the Secretary may reserve in any conveyance pursuant to this subsection such easements, subsurface rights, and any other interests in land deemed necessary or desirable: *Provide further,* That the valuation of lands

exchanged shall be determined in terms of forest uses for timber.

(3) It is the intention of Congress that land exchanges pursuant to this subsection shall be completed no later than five years after November 17, 1986. No later than sixty days after November 17, 1986, and every one hundred and eighty days thereafter, the Secretary shall report in writing to the Committee on Energy and Natural Resources of the United States Senate and the Committees on Agriculture and Interior and Insular Affairs of the United States House of Representatives, on the status of negotiations with owners of non-Federal lands to effect the exchanges authorized by this subsection.

(4) In the event that exchanges authorized by this section leave any private forest land owner with ownership of an uneconomic remnant of forest land contiguous to a special management area, the Secretary is authorized to acquire such forest lands as if they were within the boundaries of a special management area.

(5) The following-described Federal lands and interests therein are hereby identified as candidate lands for exchanges conducted pursuant to this section: *Provided,* That the determination of which candidate lands will be exchanged, and in what sequence, shall be at the discretion of the Secretary. Subject to valid existing rights, such lands are hereby withdrawn from all forms of entry or appropriation or disposal under the public land laws, and from location, entry, and patent under the United States mining law, and from disposition under all laws pertaining to mineral and geothermal leasing and all amendments thereto until the Secretary determines such

lands are no longer needed to complete exchanges authorized by this section: *Provided,* That such period shall not extend beyond five years:

GIFFORD PINCHOT NATIONAL FOREST

Wind River-Panther Creek Area

Section	Township	Range
35	4N	7E
36	4N	7E

Approx. 430 acres.

South Swift Area

Section	Township	Range
13	6N	5E
23	6N	5E
17	6N	6E
18	6N	6E

Approx. 1,920 acres.

National Area

Section	Township	Range
6	14N	7E
7	14N	7E
18	14N	7E
30	14N	7E

Approx. 2,560 acres.

Buck Creek-Willard Area

Section	Township	Range
16	3N	9E
1	4N	9E
2	4N	9E
3	4N	9E
10	4N	9E
11	4N	9E
12	4N	9E
15	4N	9E
21	4N	9E
22	4N	9E
26	4N	9E
27	4N	9E
28	4N	9E
29	4N	9E
30	4N	9E
31	4N	9E
32	4N	9E
33	4N	9E
34	4N	9E
35	4N	9E
6	4N	10E
7	4N	10E
5	5N	10E
6	5N	10E
7	5N	10E
8	5N	10E
9	5N	10E
30	5N	10E
31	5N	10E
32	5N	10E

Approx. 14,460 acres.

SIUSLAW NATIONAL FOREST

East Beaver Area

Section	Township	Range
33	2S	9W
34	2S	9W
2	3S	9W
3	3S	9W
4	3S	9W
8	3S	9W
9	3S	9W
17	3S	9W

Approx. 3,053 acres.

WILLAMETTE NATIONAL FOREST

Ida-McCoy Area

Section	Township	Range
21	10S	6E
28	10S	6E

Approx. 680 acres.

MOUNT HOOD NATIONAL FOREST

Estacada Area

Section	Township	Range
15	4S	5E

Approx. 560 acres.

Hood River Area

Section	Township	Range
4	1N	9E
36	1N	10E
31	1N	11E
2	1S	9E
3	1S	9E
4	1S	9E
5	1S	9E
6	1S	9E

Approx. 5,800 acres.

Zig-Zag Area

Section	Township	Range
22	2S	7E
29	2S	7E

Approx. 280 acres.
Total acreage: 29,743.

(e) Boundaries

For the purposes of section 460*l*-9 of this title, the boundaries of the scenic area, including special management areas and the Dodson/Warrendale Special Purchase Unit shall be treated as if they were within the boundaries of the Mount Hood or Gifford Pinchot National Forests as of January 1, 1965.

(Pub. L. 99-663, § 9, Nov. 17, 1986, 100 Stat. 4287.)

§ 544h. Interim management

(a) Interim guidances

(1) Within one hundred and eighty days after November 17, 1986, the Secretary shall develop interim guidelines for the scenic area outside urban areas to identify land use activities which are inconsistent with sections 544 to 544p of this title and to govern the authority to acquire land without the consent of the owner provided by subsection (b) of this section. The Secretary shall promptly notify the public of adoption of the interim guidelines and transmit the guidelines to each county. Guidelines adopted by the Secretary pursuant to this subsection shall remain in effect for each county until the Secretary has developed guidelines for the special management areas pursuant to section 544f of this title and the land use ordinances prescribed by section 544e of this title are in effect.

(b) Interim acquisition authority and injunctive relief

Prior to the concurrence by the Secretary of land use ordinances prescribed by section 544f of this title and the approval by the Commission of land use ordinances prescribed by section 544e of this title, the following authorities are granted:

(1) The Secretary may acquire by condemnation any land or interest which is being used or threatened to be used in a manner inconsistent with the purposes for which the scenic area was established and which will cause or is likely to cause impacts adversely affecting the scenic, cultural, recreation, and natural resources of the

scenic area: *Provided,* That no lands or interests therein can be acquired by condemnation pursuant to this section if used in the same manner and for the same purposes as used on the effective date of this Act, unless such land is used for or interest is in the development of sand, gravel, or crushed rock, or the disposal of refuse: *Provided further,* That within thirty days of the filing by the Secretary of a complaint for condemnation of any land or interest in the scenic area, outside of the special management areas and urban areas, the Commission, by a vote of two-thirds of its membership including a majority of the members appointed from each State, or if the Commission is not in existence the governor of the State in which the land or interest is located, may disapprove such proposed complaint.

(2) Upon or after the commencement of any action for condemnation pursuant to this subsection, the Secretary, acting through the Attorney General of the United States, may apply to the appropriate United States District Court for a temporary restraining order or injunction to prohibit the use of any property within the scenic area, but outside of urban areas, which will cause or is likely to cause impacts adversely affecting the scenic, cultural, recreation and natural resources of the scenic area or is otherwise inconsistent with the purposes for which the scenic area was established. During the period of such order or injunction, the Secretary shall diligently and in good faith negotiate with the owner of the property to assure that, following termination of the order or injunction, the inconsistent use is abated or the adverse effect is mitigated.

(c) Review of development action

Prior to the effective date of a land use ordinance for each county pursuant to section 544e of this title, and concurrence of the Secretary on a land use ordinance for each county pursuant to section 544f of this title, the Commission shall review all proposals for major development actions and new residential development in such county in the scenic area, except urban areas. The Commission shall allow major development actions and new residential development only if it determines that such development is consistent with the standards contained in section 544d of this title and the purposes of sections 544 to 544p of this title.

(Pub.L. 99-663, § 10, Nov. 17, 1986, 100 Stat. 4291.)

§ 544i. Economic development

(a) Economic development plan

Based on the Economic Opportunity Study and other appropriate information, each State, in consultation with the counties and the Commission, shall develop a plan for economic development projects for which grants under this section may be used in a manner consistent with sections 544 to 544p of this title.

(b) Funds provided to states for grants

Upon certification of the management plan, and receipt of a plan referred to in subsection (a) of this section, the Secretary shall provide $5,000,000 to each State which each State shall use to make grants and loans

for economic development projects that further the purposes of sections 544 to 544p of this title.

(c) Conditions of grants

Each State making grants under this section shall require as a condition of a grant that—

(1) all activities undertaken under the grant are certified by the Commission as being consistent with the purposes of sections 544 to 544p of this title, the management plan, and land use ordinances adopted pursuant to sections 544 to 544p of this title;

(2) grants and loans are not used to relocate a business from one community to another;

(3) grants and loans are not used for program administration; and

(4) grants and loans are used only in counties which have in effect land use ordinances found consistent by the Commission and concurred on by the Secretary pursuant to section 544f of this title.

(d) Report

Each State shall—

(1) prepare and provide the Secretary with an annual report to the Secretary on the use of the funds made available under this section;

(2) make available to the Secretary and to the Commission, upon request, all accounts, financial records, and other information related to grants and loans made available pursuant to this section; and

(3) as loans are repaid, make additional grants and loans with the money made available for obligation by such repayments.

(Pub.L. 99-663. § 11, Nov. 17, 1986, 100 Stat. 4292.)

§ 544j. Old Columbia River Highway

The Oregon Department of Transportation shall, in consultation with the Secretary and the Commission, the State of Oregon and the counties and cities in which the Old Columbia River Highway is located, prepare a program and undertake efforts to preserve and restore the continuity and historic integrity of the remaining segments of the Old Columbia River Highway for public use as a Historic Road, including recreation trails to connect intact and usable segments.

(Pub.L. 99-663, § 12, Nov. 17, 1986, 100 Stat. 4293.)

§ 544k. Tributary rivers and streams

(a) Water resources projects

The following rivers and streams shall be subject to the same restrictions on the licensing, permitting, and exempting from licensing and the construction of water resource projects as provided for components of the National Wild and Scenic rivers System pursuant to section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278(a)):

(1) any tributary river or stream to the Columbia River not designated in subsections (c) or (d) of this section or otherwise specified in this subsection which flows in whole or in part

through a special management area, unless the construction of a water resources project would not have a direct and adverse effect on the scenic, cultural, recreation, and natural resources of the scenic area;

(2) any river or river segment which flows in whole or in part through the scenic area and which is established pursuant to State law as a wild, scenic, or recreation river or which is under study pursuant to State law for the potential inclusion in any such State protected river system, unless such project or projects meet terms and conditions set by State agencies exercising administration over such river or river segment;

(3) the Wind River, Washington, for a period not less than three years following the later of—

(A) final approval of the Gifford Pinchot National Forest Plan, adopted pursuant to the National Forest Management Act of 1976 (Act of October 22, 1976, Public Law 94-588, as amended) (16 U.S.C. 1660 et seq.); or

(B) submittal by the Secretary of a report to the President on the suitability or nonsuitability for addition to the national wild and scenic rivers system and a report by the President to the Congress of recommendations and proposals with respect to the designation of such river under the Wild and Scenic Rivers Act [16 U.S.C.A. § 1271 et seq.];

(4) the Hood River, Oregon, for a period not to exceed twenty years from November 17,

1986, if such facility impounds or diverts water other than by means of a dam or diversion existing as of November 17, 1986; and

(5) the segment of the Little White Salmon, Washington, from the Willard National Fish Hatchery to its confluence with the Columbia River if such facility impounds or diverts water other than by means of a dam or diversion existing as of November 17, 1986.

(b) Exceptions

The provisions of subsection (a) of this section shall not apply to those portions of tributary rivers or streams to the Columbia River which flow through or border on Indian reservations. Nothing in this section shall apply to or affect any segment of any river designated as a wild and scenic river under section 3 of the Wild and Scenic Rivers Act (16 U.S.C. 1274) or any river designated for study under section 5 of such Act (16 U.S.C. 1276).

(Pub.L. 99-663, § 13(a), (b), Nov. 17, 1986, 100 Stat. 4293.)

§ 544*l*. Implementation measures

(a) Assistance to counties

The Secretary shall provide technical assistance on a nonreimbursable basis to counties for the development of land use ordinances prescribed by sections 544e and 544f of this title: *Provided,* That in the event a county fails to obtain approval by the Commission for a land use ordinance within three years after the date technical assistance is first provided under this subsection for the development of a land use ordinance, the Secretary shall

terminate all technical assistance for any participation in the development of such ordinance.

(b) Payment of timber receipts

(1) Notwithstanding the provisions of the last paragraph under the heading "Forest Service" of the Act of May 23, 1908 (c. 192, 35 Stat. 251, as amended; 16 U.S.C. 500 [16 U.S.C.A. § 500]), and of section 13 of the Act of March 1, 1911 (c. 186, 36 Stat. 961, as amended; 16 U.S.C. 500 [16 U.S.C.A. § 500]), that portion of which is paid under such provisions to the State of Oregon with respect to the special management areas within the Mount Hood National Forest, the Gates of the Columbia Gorge Special Management Area, Mount Hood National forest, and to the State of Washington with respect to the special management areas within the Gifford Pinchot National Forest—

(A) not less than 50 per centum shall be expended for the benefit of the public schools of the county which has adopted implementation measures pursuant to sections 544 to 544p of this title; and

(B) the remainder shall be expended for the benefit of public roads or any public purposes of any county which has adopted implementation measures pursuant to sections 544 to 544p of this title.

(2) Paragraph (1) of this subsection shall not apply—

(A) to any amount paid by the Secretary of the Treasury under the provisions of law referred to in subsection (b)(1) of this section at

the end of any fiscal year ending before November 17, 1986; or

(B) for a particular county, if the county does not have in effect a land use ordinance which has been found consistent by the Commission and concurred on by the Secretary pursuant to section 544f of this title.

(c) Payments to local governments

(1) Subject to section 544n(b) of this title, in the case of any land or interest therein acquired by the Secretary pursuant to section 544g of this title, which was subject to local real property taxes within the five years preceding such acquisition and which is located in a county which has in effect a land use ordinance which has been found consistent by the Commission and concurred on by the Secretary pursuant to section 544f of this title, the Secretary is authorized and directed to make annual payments to the county in which such lands are located in an amount equal to 1 per centum of the fair market value of such land or interest therein on the date of acquisition by the Secretary.

(2) Notwithstanding paragraph (1) of this subsection, any payment made for any fiscal year to a county pursuant to this subsection shall not exceed the amount of real property taxes assessed and levied on such property during the last full fiscal year before the fiscal year in which such land or interest therein was acquired by the Secretary.

(3) No payment shall be made under this subsection with respect to any land or interest therein after the fifth

full fiscal year beginning after the first fiscal year in which such a payment was made with respect to such land or interest therein.

(d) Federal consistency

Except as otherwise provided in subsection (e) of this section or in section 544*o* of this title, Federal agencies having responsibilities within the scenic area shall exercise such responsibilities consistent with the provisions of sections 544 to 544p of this title as determined by the Secretary.

(e) Limitations of federal expenditures affecting scenic area

(1) Except as provided in paragraph (3), if the Commission has not been established pursuant to section 544c of this title within fifteen months after November 17, 1986, or is otherwise disestablished for any reason, no new expenditures or new financial assistance may be made available, and no new license or new permit, or exemption from a license or permit requirement, shall be issued, under authority of any Federal law for any activity within the scenic area, excluding urban areas, which the Secretary,[1] determines is inconsistent with any implementation measure pursuant to, the standards established in section 544d(b) of this title, or the purposes of sections 544 to 544p of this title.

(2)(A)(i) An expenditure or financial assistance made available under authority of Federal law shall be

treated, for purposes of this subsection, as a new expenditure or new financial assistance if—

(I) in any case with respect to which specific appropriations are required, no money for construction or purchase was appropriated before October 1, 1986; or

(II) no legally binding commitment for the expenditure or financial assistance was made before October 1, 1986.

(ii) Payments made to the State pursuant to the following acts shall not be treated as an expenditure or financial assistance for purposes of this subsection: the Act of May 23, 1908, (c. 192, 35 Stat. 251; 16 U.S.C. 500 [16 U.S.C.A. § 500]); section 13 of the Act of March 1, 1911 (c. 186, 36 Stat. 961; 16 U.S.C. 500 [16 U.S.C.A. § 500]); the Mineral Lands Leasing Act of 1920 [30 U.S.C.A. § 181 et seq.]; chapter 69 of Title 31 (relating to payments in lieu of taxes for entitlement land); the Act of June 9, 1916 (39 Stat. 218), and the Act of Feb. 26, 1919 (40 Stat. 1179).

(B) A license or permit, or exemption from a license or permit requirement, shall be treated, for purposes of this subsection, as a new license or new permit, or exemption from a license or permit requirement, if such license or permit, or exemption from a license or permit requirement, was issued on or after October 1, 1986. A renewal under similar terms and conditions of a license or permit, or exemption from a license or permit requirement, issued before October 1, 1986, shall not be treated as a new license or new permit, or exemption from a license or permit requirement.

(3) Notwithstanding paragraph (1), the appropriate Federal officer, after consultation with the Secretary, may make Federal expenditures or financial assistance available within the area for any of the following:

(A) The maintenance of existing channel improvements and related structures, and including the disposal of dredge materials related to such improvements.

(B) The maintenance, replacement, reconstruction, or repair, but not the expansion, of publicly owned or publicly operated roads, structures, or facilities that are essential links in a larger network or system.

(C) Military activities essential to national security.

(D) Any of the following actions or projects, but only if the making available of expenditures or assistance therefor is consistent with the standards in section 544d(b) of this title and the purposes of sections 544 to 544p of this title:

(i) Projects for the study, management, protection and enhancement of fish and wildlife resources and habitats, including, but not limited to, acquisition of fish and wildlife habitats and related lands, stabilization projects for fish and wildlife habitats, and recreational projects.

(ii) The establishment, operation, and maintenance of air and water navigation aids and devices, and for access thereto.

(iii) Projects under the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-4 through 11) [16 U.S.C.A.

§ 4601-4 et seq.] and the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(iv) Scientific research, including but not limited to aeronautical, atmospheric, space, geologic, marine, fish and wildlife, and other research, development, and applications.

(v) Assistance for emergency actions essential to the saving of lives and the protection of property and the public health and safety, if such actions are performed pursuant to sections 5145 and 5146 of Title 42 and section 4103 of Title 42 and are limited to actions that are necessary to alleviate the emergency.

(vi) The maintenance, replacement, reconstruction, or repair, but not the expansion, of publicly owned or publicly operated roads, structures, or facilities. This clause shall not apply to roads, structures, or facilities referred to in paragraph (3)(B).

(vii) Nonstructural projects for shoreline stabilization that are designed to mimic, enhance, or restore natural stabilization systems.

(4) The Director of the Office of Management and Budget shall, on behalf of each Federal agency concerned, make written certification that each such agency has complied with the provisions of this subsection during each fiscal year beginning after September 30, 1987. Such certification shall be submitted on an annual basis to the House of Representatives and the Senate pursuant to the schedule required under the Congressional Budget and Impoundment Control Act of 1974.

(5) Nothing contained in this subsection shall be construed as indicating an intent on the part of the Congress to change the existing relationship of other Federal laws to the law of a State, or a political subdivision of a State, or to relieve any person or any obligation imposed by any law of any State, or political subdivision of a State. No provision of this subsection shall be construed to invalidate any provision of State or local law unless there is a direct conflict between such provision and the law of the State, or political subdivision of the State, so that the two cannot be reconciled or consistently stand together. This subsection shall in no way be interpreted to interfere with a State's right to protect, rehabilitate, preserve, and restore lands within its established boundary.

(f) Transfer of public lands

Subject to valid existing rights, all public lands within the scenic area administered by the Secretary of the Interior through the Bureau of Land Management are hereby transferred without consideration to the jurisdiction of the Secretary to be managed as National Forest lands in accordance with the provisions of sections 544 to 544p of this title.

(Pub.L. 99-663, § 14, Nov. 17, 1986, 100 Stat. 4294.)

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[1] So in original. Comma probably should not appear.

§ 544m. Enforcement

(a) Administrative remedies

(1) Commission orders

The Commission shall monitor activities of counties pursuant to sections 544 to 544p of this title and shall take such actions as it determines are necessary to ensure compliance.

(2) Appeal to commission

Any person or entity adversely affected by any final action or order of a county relating to the implementation of sections 544 to 544p of this title may appeal such action or order to the Commission by filing with the Commission within thirty days of such action or order, a written petition requesting that such action or order be modified, terminated, or set aside.

(3) Civil penalties

Any person or entity who willfully violates the management plan or any land use ordinance or any implementation measure or any order issued by the Commission pursuant to sections 544 to 544p of this title may be assessed a civil penalty by the Commission not to exceed $10,000 for each violation. No penalty may be assessed under this subsection unless such person or entity is given notice and opportunity for a public hearing with respect to such violation. The Commission may compromise, modify, or remit, with or without conditions, any penalty imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the violator to remedy the violation in a timely manner.

(b) Judicial remedies

(1) Civil actions to enforce sections 544 to 544p of this title

(A) Except as otherwise limited by sections 544 to 544p of this title, the Attorney General of the United States may, at the request of the Secretary, institute a civil action for an injunction or other appropriate order to prevent any person or entity from utilizing lands within the special management areas in violation of the provisions of sections 544 to 544p of this title, interim guideline adopted or other action taken by the Secretary pursuant to sections 544 to 544p of this title.

(B) The Commission, or, at the request of the Commission, or the attorney general of Oregon or Washington, may institute a civil action for an injunction or other appropriate order to prevent any person or entity from utilizing lands within the scenic area outside urban areas in violation of the provisions of sections 544 to 544p of this title, the management plan, or any land use ordinance or interim guideline adopted or other action taken by the Commission or any county pursuant to sections 544 to 544p of this title.

(2) Citizens suits

Any person or entity adversely affected may commence a civil action to compel compliance with sections 544 to 544p of this title—

(A) against the Secretary, the Commission or any county where there is alleged a violation of the provisions of sections 544 to 544p of this title, the management plan or any land use ordinance or interim guideline

adopted or other action taken by the Secretary, the Commission, or any county pursuant to or Commission under sections 544 to 544p of this title; or

(B) against the Secretary, the Commission, or any county where there is alleged a failure of the Secretary, the Commission or any county to perform any act or duty under sections 544 to 544p of this title which is not discretionary with the Secretary, the Commission or any county.

(3) Limitation on bringing of citizens suits

No action may be commenced—

(A) under paragraph (2)(A) of this subsection—

(i) prior to sixty days after the plaintiff has given notice in writing of the alleged violation to the Secretary, to the Commission, and to the county in which the violation is alleged to have occurred; or

(ii) if the Attorney General of the United States, or the attorney general of Oregon or Washington, has commenced and is diligently prosecuting a civil action on the same matter pursuant to paragraph (1) of this subsection to require compliance with the management plan or any regulations, guidelines, or standards issued or other actions taken by the Secretary, the Commission, or any county pursuant to sections 544 to 544p of this title: *Provided,* That in any such action any person or entity otherwise entitled to bring an action pursuant to paragraph (2) of this subsection may intervene as a matter of right; or

(iii) which challenges the consistency of the draft management plan with the purposes and standards of sections 544 to 544p of this title or with other applicable law prior to the certification or adoption of the Management Plan pursuant to section 544d of this title; or

(B) under paragraph (2)(B) of this subsection prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary, the Commission, and to the county in which the failure to perform any act or duty pursuant to sections 544 to 544p of this title is alleged: *Provided,* That such action may be brought immediately after such notification where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

(4) Judicial review

Any person or entity adversely affected by—

(A) any final action or order of a county, the Commission, or the Secretary relating to the implementation of sections 544 to 544p of this title;

(B) any land use ordinance or interim guideline adopted pursuant to sections 544 to 544p of this title;

(C) any appeal to the Commission pursuant to this section;

(D) any civil penalty assessed by the Commission pursuant to paragraph (a)(3) of this subsection may appeal such action or order by filing in any of the courts specified

in paragraph (5) of this subsection, within sixty days after the date of service of such order or within sixty days after such action is taken, a written petition requesting such action, order, land use ordinance, interim guideline, or appeal taken to the Commission be modified, terminated, or set aside.

(5) Federal court jurisdiction

The United States district courts located in the States of Oregon and Washington shall have jurisdiction over—

(A) any criminal penalty imposed pursuant to section 551 of this title, or any other applicable law for violation of any order, regulation or other action taken by the Secretary pursuant to sections 544 to 544p of this title;

(B) any civil action brought against the Secretary pursuant to this section; or

(C) any appeal of any order, regulation, or other action of the Secretary taken pursuant to paragraph (4) of this subsection.

(6) State court jurisdiction

The State courts of the States of Oregon and Washington shall have jurisdiction—

(A) to review any appeals taken to the Commission pursuant to subsection (a)(2) of this section;

(B) over any civil action brought by the Commission pursuant to subsection

(b)(1) of this section or against the Commission, a State, or a county pursuant to subsection (b)(2) of this section;

(C) over any appeal of any order, regulation, or other action of the Commission or a county taken pursuant to paragraph 4 of this subsection; or

(D) any civil penalties assessed by the Commission pursuant to subsection (a)(3) of this section.

(Pub. L. 99-663, § 15, Nov. 17, 1986, 100 Stat. 4297.)

§ 544n. Authorization of appropriations

(a) Authorizations

There are authorized to be appropriated for fiscal years after the fiscal year 1986 such sums as are described below;

(1) For the purpose of acquisition of lands, water and interests therein pursuant to sections 544 to 544p of this title: $40,000,000: *Provided,* That of this amount no more than $10,000,000 shall be available to acquire lands, water, and interests therein pursuant to section 544h of this title. Such amounts are authorized to be appropriated from amounts covered into the Land and Water Conservation Fund notwithstanding any allocation, apportionment, or limitation contained in the Land and Water Conservation Fund (16 U.S.C. 4601-4 and following).

(2) For the purpose of providing payments to local governments pursuant to section 544*l*(c) of this title: $2,000,000.

(b) Appropriation upon concurrence of management plan

There are authorized to be appropriated for fiscal years after the fiscal year 1986, effective upon concurrence on the management plan pursuant to section 544d of this title:

(1) For the purpose of construction of an interpretive center to be located in the State of Oregon, and a conference center to be located in the State of Washington: $10,000,000.

(2) For the purpose of construction of recreation facilities pursuant to section 544e(d) of this title: $10,000,000.

(3) For the purpose of preparing a program and restoring and reconstructing the Old Columbia River Scenic Highway, Oregon pursuant to section 544j of this title: $2,800,000.

(4) For the purpose of providing economic development grants pursuant to section 544i of this title: $5,000,000 for each State: *Provided,* That funds authorized to be appropriated pursuant to this paragraph shall be available for the acquisition of lands and interests therein pursuant to section 544h of this title if, at the expiration of three years, the States have failed to carry out their respective function pursuant to section 544c of this title.

(c) Availability of funds

Funds appropriated under subsections (a)(2) and (b) of this section shall not be made available for any county which does not have in effect a land use ordinance which has been found to be consistent by the Commission, and

concurred on by the Secretary as consistent with the management plan pursuant to section 544f of this title.

(Pub.L. 99-663, § 16, Nov. 17, 1986, 100 Stat. 4300.)

§ 544*o*. Savings provisions

(a) Effect on rights of Indians, use of water, rivers and streams, interstate compacts, existing transmission facilities, hunting and fishing, forest plans, scenic areas

Nothing in sections 544 to 544p of this title shall—

(1) affect or modify any treaty or other rights of any Indian tribe;

(2) except as provided in section 544k(c) of this title, authorize the appropriation or use of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual;

(3) except as provided in section 544k(c) of this title, affect the rights or jurisdictions of the United States, the States, Indian tribes or other entities over waters of any river or stream or over any ground water resource or affect or interfere with transportation activities on any such river or stream;

(4) except as provided in section 544k(c) of this title, alter, establish, or affect the respective rights of the United States, the States, Indian tribes, or any person with respect to any water or water-related right;

(5) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States before the enactment of this Act;

(6) affect or modify the ability of the Bonneville Power Administration to operate, maintain, and modify existing transmission facilities;

(7) affect lands held in trust by the Secretary of the Interior for Indian tribes or individual members of Indian tribes or other lands acquired by the Army Corps of Engineers and administered by the Secretary of the Interior for the benefit of Indian tribes and individual members of Indian tribes;

(8) affect the laws, rules and regulations pertaining to hunting and fishing under existing State and Federal laws and Indian treaties;

(9) require any revision or amendment of any forest plan adopted pursuant to the National Forest Management Act of 1976 (Act of October 22, 1976, Public Law 94-588, as amended (16 U.S.C. 1600 et seq.) [16 U.S.C.A. § 1600 et seq.]); or

(10) establish protective perimeters or buffer zones around the scenic area or each special management area. The fact that activities or uses inconsistent with the management directives for the scenic area or special management areas can be seen or heard from these areas shall not, of itself, preclude such activities or uses up to the boundaries of the scenic area or special management areas.

(b) Improvement of navigation facilities at Bonneville Dam

Except for the offsite disposal of excavation material, nothing in sections 544 to 544p of this title shall be construed to affect or modify the responsibility of the

United States Army Corps of Engineers to improve navigation facilities at Bonneville Dam pursuant to Federal law.

(c) Responsibilities of non-Federal timber land owners

Except for the management, utilization, or disposal of timber resources of non-Federal lands within the special management areas, nothing in sections 544 to 544p of this title shall affect the rights and responsibilities of non-Federal timber land owners under the Oregon and Washington Forest Practices Acts or any county regulations which under applicable State law supersede such Acts.

(d) Interstate compacts

Mandatory language in sections 544 to 544p of this title respecting the powers and responsibilities of the Commission shall be interpreted as conditions precedent to congressional consent to the interstate compact described in section 544c of this title.

(e) Failure to establish Columbia River Gorge Commission; responsibility of Secretary

In the event that the States of Washington and Oregon fail to comply with the provisions of section 544c of this title, the Secretary shall not be obligated to take actions which are predicated upon the establishment of the Commission.

(f) Actions of Secretary as major Federal actions affecting the environment

(1) Actions by the Secretary pursuant to subsections (f), (g), and (h) of section 544d of this title; subsections (f), (j), (k), and (*l*) of section 544f of this title; section 544g of

this title; and subsections (a) and (b)(2) of section 544h of this title shall neither be considered major Federal actions significantly affecting the quality of the environment under section 102 of the National Environmental Policy Act (42 U.S.C. 4332 [42 U.S.C.A. § 4332]) nor require the preparation of an environmental assessment in accordance with that Act [42 U.S.C.A. § 4321 et seq.].

(2) Except as provided in paragraph (1) of this subsection, nothing in sections 544 to 544p of this title shall expand, restrict, or otherwise alter the duties of the Secretary under the National Environmental Policy Act.

(Pub. L. 99-663, § 17, Nov. 17, 1986, 100 Stat. 4300.)

§ 544p. Severability

(a) If any provision of sections 544 to 544p of this title or the application thereof to any person, State, Indian tribe, entity, or circumstance is held invalid, neither the remainder of sections 544 to 544p of this title, nor the application of any provisions herein to other persons, States, Indian tribes, entities, or circumstances, shall be affected thereby.

(Pub. L. 99-663. § 18, Nov. 17, 1986, 100 Stat. 4302)

APPENDIX E

United States Department of Agriculture
Forest Service
Pacific Northwest Region
[LOGO]

Columbia River Gorge
National Scenic Area

Final Interim Guidelines
June 30, 1987

Appendix to Complaint for Declaratory and Injunctive Relief

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CHAPTER I: INTRODUCTION

Public Law 99-663 was signed by President Reagan on November 17, 1986, establishing the Columbia River Gorge National Scenic Area. This law provides direction for a partnership of federal, state, and local agencies to develop a plan for protection and management of the resources in the Gorge. These Interim Guidelines establish the standards by which proposed developments and changes in land uses or enhancement proposals will be evaluated for consistency with the purposes of that legislation.

Section 10 of the Act requires that Interim Guidelines be adopted by the Secretary of Agriculture for the Scenic Area outside Urban Areas. According to the Act, the Interim Guidelines will provide standards to: 1) "identify new land use activities and developments which are

inconsistent with the Act," and 2) "to govern the authority to acquire land without the consent of the owner" (Section 10(a)).

These Interim Guidelines will "remain in effect for each county until the Secretary has developed guidelines for the Special Management Areas pursuant to Scetion 8 of the Act and the land use ordinances prescribed by Section 7 are in effect" (Section 10(a)). These are expected to be completed by the end of 1990.

A. BACKGROUND

The Columbia River Gorge National Scenic Area Act was established for two purposes: "1) to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and 2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing Urban Areas and by allowing future economic development in a manner consistent with the first purpose" (Section 3).

The Scenic Area Act gives special designation to two categories of land: Urban Areas and Special Management Areas. Thirteen communities in Oregon and Washington within the Scenic Area are designated as Urban Areas, and are exempt from most provisions of the legislation. Special Management Areas are generally the most environmentally sensitive lands, where activities are more restricted than in other parts of the Scenic Area. These include islands in the Columbia River. All areas not specifically designated as Special Management Areas or Urban Areas are identified as General Management Areas in

these Guidelines. Copies of maps with these designations are available from the Scenic Area offices.

Section 6(d) of the Act lists standards for the Management Plan which also are used as the basis for Interim Guidelines. The Management Plan will identify ways to provide the enhancement called for in Section 6(d), but the objective here is to provide needed protection in the meantime, and enhancement opportunities as they might occur. "The Management Plan, all land use ordinances, and Interim Guidelines shall include provisions to:

(1)protect and enhance agricultural lands for agricultural uses and to allow, but not require, conversion of agricultural lands to open space, recreation development, or forest lands;

(2)protect and enhance forest lands for forest uses and to allow, but not require, conversion of forest lands to agricultural lands, recreation development, or open spaces;

(3)protect and enhance open spaces;

(4)protect and enhance public and private recreation resources and educational and interpretive facilities and opportunities, in accordance with the Recreation Assessment required by the Act;

(5)prohibit major development actions in Special Management Areas, except for partitions or short plats which the Secretary determines are desirable to facilitate land acquisitions pursuant to this Act;

(6)prohibit industrial development in the Scenic Area outside Urban Areas;

(7)require that commercial development outside Urban Areas take place without adversely affecting the scenic, cultural, recreation, or natural resources of the Scenic Area;

(8)require that residential development outside Urban Areas take place without adversely affecting the scenic, cultural, recreation, and natural resources of the Scenic Area; and

(9)require that the exploration, development and production of mineral resources, and the reclamation of lands thereafter, take place without adversely affecting the scenic, cultural, recreation and natural resources of the Scenic Area." (Section 6(d))

For any proposed land or water use activity or development outside Urban Areas, a determination will be made as to its consistency with the Act, using these Guidelines as standards for determinations of consistency. This includes lands managed by or activities proposed by federal, state or local public agencies, as well as private land uses and developments. There are some limitations on application of the Guidelines for certain agencies as described in Section 17 of the Scenic Area Act.

Lands which are "used or threatened to be used in a manner inconsistent with the purposes for which the Scenic Area was established, and which will cause or likely cause impacts adversely affecting the scenic, cultural, recreation, and natural resources of the area," may become subject to acquisition by the United States (Section 10(b)(1)).

CHAPTER II: INTERIM MANAGEMENT

A. ADMINISTRATION

The Scenic Area Act creates a partnership among the six counties within the Columbia River Gorge (Clark, Skamania, and Klickitat in Washington and Multnomah, Hood River, and Wasco in Oregon), a Bi-state Commission, and the USDA Forest Service. As explained in this Chapter, each partner has important, but different, responsibilities in the Scenic Area. Together these agencies provide the overall coordination and management to achieve the purposes of the Act.

These Guidelines were developed in consultation and cooperation with the local Scenic Area counties and other agencies in an attempt to avoid conflicts or inconsistencies in procedural requirements. They are not intended to supersede or eliminate the usual state or local development permit processes. Development applications will still be reviewed by these agencies, and must meet all applicable state and local laws and regulations. The National Scenic Area consistency determination is supplemental to those processes of state and local governments.

Prior to completion of the Management Plan and the adoption of county ordinances, the Bi-state Commission will evaluate proposals for major development actions and new residential development. "The Commission shall allow major development actions and new residential development only if it determines that such development is consistent with the standards contained in Section 6(d)

of the Act" (Section 10(c)). Urban Areas are exempt from this review.

The Forest Service will review proposals other than major development actions and residential development which are reviewed by the Commission. The Forest Service Scenic Area Manager is the official responsible for determining whether those proposals are consistent with the Act.

Where "land is being used or is threatened to be used in a manner inconsistent with the purposes for which the Scenic Area was established and which will cause or is likely to cause impacts adversely affecting the scenic, cultural, creation, and natural resources of the Scenic Area," the Secretary of Agriculture has the authority to acquire the land without consent of the owner (Section 10(b)(1)).

B. REVIEW OF PROPOSED LAND USE ACTIVITIES AND DEVELOPMENTS

APPLICATION REQUIREMENTS

Any change in existing land or water use or development will require a determination of consistency with the Scenic Area Act. To obtain this determination, a Land Use Application Form must be submitted to either the Forest Service or the Bi-State Commission Scenic Area offices. The Form provides the detailed information needed for the evaluation.

The Application Form should be submitted either prior to or at the same time as the application for the appropriate county permits. This Form is required for all types of proposals, regardless of whether or not a county permit is

required. Application forms are available at the Scenic Area offices and local County Planning offices.

Necessary information for the Application Form includes at least: 1) a legal description, a map of the location, and a plot plan for the project proposal; 2) a complete description of the proposal; 3) identification of the scenic, cultural, recreation and natural resources known to exist on the site; and 4) a discussion on how the project complies with these guidelines. To the extent possible, the Application Form will use the same information as that required for county permits. Where inventories already exist, such information will be provided to the applicant by the Forest Service. The applicant may also be requested to provide additional site analysis information.

EVALUATION PROCESS

Once a completed Application Form is received at the Scenic Area Office, it will be evaluated for consistency with the Act as soon as possible. In most cases the evaluation will take place within ten working days. Where a proposal appears to have potential for adverse effects on the scenic, cultural, recreation, or natural resources of the Scenic Area, it may require additional time. In cases requiring more than ten days, direct contact with the applicant will be made and an explanation of the status offered. The following section describes in detail the steps in the evaluation process.

Step 1

An applicant for a consistency determination will submit an Application Form to either the Bi-state Commission or Forest Service Scenic Area office. Applications must be complete, including the information discussed in Application Requirements, Section B-1 above, and relevant site analysis information as discussed in Chapter III.

Within one working day after receipt of a completed Application Form, a determination will be made as to which office will review the proposal. If it is a major development action or residential development, the Bi-State Commission will review it; the Forest Service will review all others. It will be forwarded to the appropriate office and a staff person will be assigned to coordinate the evaluation and prepare a report.

Step 2

For proposals reviewed by the Forest Service, Step 2 of the process will normally take ten working days to complete. During this time, staff will determine if the proposed action is consistent with the standards in Section 6(d) of the Act, or if it will adversely affect the scenic, cultural, recreation or natural resources of the Scenic Area, based on the guidelines in Chapter III of this document. This evaluation will consider all of the information provided in the application, and may also depend on discussions with other affected agencies and/or on-site field visits.

In some cases a land use or development proposal may have the potential to adversely affect the resources

intended to be protected and enhanced by the Scenic Area Act. If evaluation of a proposal indicates this potential, the applicant will be contacted. Frequently, adverse effects can be eliminated through design changes or adjustments in the magnitude or duration of the proposal. Through discussions between the Forest Service Staff and the applicant, mitigation measures may be designed and incorporated into the proposal in an attempt to reduce impacts to an acceptable level.

The amount of time required and the magnitude of the changes depend on the nature of the initial proposal. The Scenic Area staff will make every effort to expedite this redesign process. However, the applicant is primarily responsible for providing the data and information necessary to support a determination of consistency with the Scenic Area Act and these Interim Guidelines.

The project evaluation process which the Bi-State Commission staff will follow has yet to be determined. Upon completion of the evaluation, findings and recommendations will be forwarded to the Scenic Area Manager or the Commission for the final consistency determination.

Step 3

In Step 3 the Scenic Area Manager or the Bi-State Commission will make a determination of consistency for the proposed action. The report of findings and the determination of consistency will be forwarded to the applicant. Applicants receiving approved or consistent findings may continue the required permit process for their development with the appropriate county or other agencies. If other permits are not required, the project

may be implemented immediately. Where there is a finding of inconsistency, the applicant will lose protection from condemnation if the project is implemented.

For applications reviewed by the Forest Service, if mitigation and redesign features are not agreed upon, the applicant may seek administrative review of the inconsistency determination. Any affected person who objects to a determination made by the Scenic Area Manager may appeal the decision to the Regional Forester using standard procedures for administrative review contained in 36 CFR 211.18.

CHAPTER III: GUIDELINES FOR LAND AND WATER USE AND DEVELOPMENT

This chapter describes the standards by which changes in land or water uses or proposed developments will be evaluated for consistency with the Scenic Area Act. Section A contains general guidelines that apply to all proposals in the Scenic Area outside of Urban Aress.

Section B describes the guidelines by which any potential for adverse effects on scenic, cultural, recreation, or natural resources will be evaluated. Possible measures to mitigate adverse effects are discussed. The guidelines apply to land and water uses and development proposals of all types, except forest practices in the General Management Area and uses which are excluded in Section 17 of the Act.

Section C contains guidelines for each of the specific land uses addressed in the Scenic Area Act.

A. GUIDELINES FOR ALL DEVELOPMENT

The following guidelines apply to all proposals for land and water uses or developments outside Urban Areas:

1) Any use or development proposed by a federal, state, or local agency, or by any private party, shall be subject to a consistency determination unless specifically exempted herein or by the Savings provisions of Section 17 of the Act.

2) Any use or development that existed on the date of the Scenic Area Act, if used in the same manner and for the same purposes, is not affected by these guidelines, except: a) the development of sand, gravel, or crushed rock; b) the disposal of refuse; or c) uses discontinued for a period of more than one year. These listed uses are subject to a consistency determination. The policy defining vested rights for existing uses, adopted by the Scenic Area Manager on March 19, 1987, on file at the Scenic Area Offices, will be used for identifying uses that existed on the date of the Act.

3) Uses or developments shall not adversely affect the scenic, cultural, recreation, or natural resources of the Scenic Area.

4) Uses or developments which are found to be consistent with the Scenic Area Act remain subject to all applicable federal, state, and local laws, regulations, and requirements.

5) When a structure is destroyed or partially destroyed, it will be considered an existing use when replaced in

kind and in the same location within one year. The exterior color and reflectivity of replacement structures must be consistent with the scenic guidelines in Chapter III. Replacement of a structure or use that differs in size or location from the original shall be subject to a consistency determination.

6) When a use of development is discontinued for more than one year, its replacement shall be subject to a consistency determination.

7) Any modification to a use or development that alters a structure or use in size or location shall be subject to a consistency determination.

B. PROTECTION OF SCENIC, CULTURAL, RECREATION AND NATURAL RESOURCES

This section provides guidelines for land and water uses or developments, and for modifications to existing uses or developments, to insure that the scenic, cultural, recreation and natural resources are protected. Through application of these guidelines, protection of the resources can be achieved, setting the stage for long term enhancement in the Management Plan to be prepared during the next three to five years.

The guidelines in this section apply to most land and water uses and developments within the General Management Areas and Special Management areas, regardless of their use category. They do not apply to forest practices in the General Management Area or to other activities that are specifically exempted in the savings provisions in Section 17 of the Act.

Analysis of potential impacts will include consideration of cumulative effects and take into account any mitigation that is designed into the project. Where a use or development may impact Scenic Area resources, consistency with these guidelines can often be achieved through mitigation measures, or through redesign of the project to reduce or eliminate adverse consequences which might otherwise occur. The Scenic Area staff will discuss mitigation and redesign opportunities with the applicant in an attempt to allow a proposed use to proceed while still protecting Scenic Area resources. If mitigation and redesign features are not agreed upon, the applicant may seek administrative review of an inconsistency determination as discussed in Chapter II, Section B.

Consistency determinations shall be based on the following guidelines:

1. SCENIC RESOURCES

OBJECTIVE: To protect and enhance scenic resources in Special Management Areas and General Management Areas pending completion of the Management Plan.

Protection will be accomplished by:

a. minimizing impacts on scenery that is viewed by the greatest number of people, i.e., key viewing areas;

b. insuring that development harmonizes with and complements its surroundings, rather than contrasts; and

c. avoiding dramatic changes in the landscape character where land or water uses or developments are proposed.

GUIDELINES

1) Proposed uses or developments shall protect or enhance the scenic resources by avoiding changes in the particular landscape setting, and/or by minimizing the impact from site-specific development.

2) Proposed uses or developments shall not change the landscape setting of a site or its immediate surroundings from an undeveloped to a rural or developed setting, or from a rural to a developed setting.

3) Proposed uses or developments shall not detract from or impair views from key viewing areas.

4) Size, shape, color, texture, siting, height, building materials, lighting or other features of a proposed development shall not noticeably contrast with the landscape setting.

5) Proposed structure shall not protrude above the line of a bluff, cliff, or skyline as seen from key viewing areas.

6) Proposed uses or developments shall be screened from view of key viewing areas. Wherever possible, screening will make use of topographic or other natural features and/or native vegetation.

7) Except as necessary for preparation of an actual building site, proposed uses or developments shall not appear to modify the vegetation as seen from key viewing areas.

8) Proposed improvements seen from key viewing areas shall be aligned, designed and sited to fit the natural topography and to minimize visible grading or other

modifications of land forms, vegetation cover, and natural characteristics. Improvements would include, but are not limited to: roads, parking areas, logging landings, rights-of-way, storage areas, fences, and site preparation for structures.

9) Proposed uses or developments in undeveloped and rural settings shall meet the visual quality objective of Partial Retention, as defined in the Forest Service Visual Management System.

10) Proposals for enhancement of scenic resources are encouraged as long as they will protect the cultural, recreation or natural resources.

2. CULTURAL RESOURCES

OBJECTIVE: To protect and enhance cultural resources in the Special Management Areas and General Management Areas pending completion of the Management Plan and implementing ordinances.

Protection will be accomplished by:

a. requiring identification of any cultural resources on sites proposed for new developments or changes in use;

b. requiring mitigation where possible to avoid adversely effecting cultural resources where they are identified; and

c. finding proposals inconsistent where mitigation will not result in adequate protection of the cultural resources.

GUIDELINES

1) Proposed uses or developments shall not damage or destroy cultural resources existing on the site or in the vicinity.

2) Proposed developments or changes in use on a parcel containing or likely to contain cultural resources shall require a cultural resource inventory to be conducted by a qualified professional.

3) Proposed uses or developments for sites where cultural resources are found shall include design of adequate mitigation measures. Mitigation must be designed in consultation with the State Historic Preservation Officer and/or the Advisory Council on Historic Preservation, as appropriate. Mitigation can include avoiding the site where the resources are found, properly protecting the resources from damage during development, or recovering the resource from the site. Where mitigation will not result in adequate protection, the proposal shall be found inconsistent with the Act.

4) Proposals for enhancement of cultural resources are encouraged as long as they will protect the scenic, recreation or natural resources.

3. RECREATION RESOURCES

OBJECTIVE: To protect and enhance recreation resources in the Special Management Areas and General Management Areas pending completion of the Management Plan.

Protection will be accomplished by:

a. requiring identification of existing recreation resources in the vicinity that could be impacted by the proposed use or development;

2. requiring mitigation or redesign where possible to avoid adversely effecting the recreation resources; and

3. finding proposals inconsistent where mitigation will not result in adequate protection of the recreation resources.

GUIDELINES

1) Proposed uses or developments shall not displace or detract from an existing recreation use or change an existing recreation setting.

2) Proposed uses or developments shall not preclude options for future recreation use, especially those uses identified in the Recreation Assessment.

3) Proposals for enhancement of recreation resources are encouraged as long as they will protect the scenic, cultural, or natural resources.

4. NATURAL RESOURCES

OBJECTIVE: To protect and enhance natural resources in the Special Management Areas and General Management Areas pending completion of the Management Plan.

Protection will be achieved by:

a. requiring identification of any natural resources on sites proposed for changes in use or development;

b. requiring mitigation where possible to avoid adversely effecting natural resources where they are located; and

c. finding proposals inconsistent where mitigation will not result in adequate protection of the natural resources.

1) Proposed developments or changes in use shall not degrade or destroy the natural resources existing on a site proposed for development, or cause off-site impacts that could result, individually or cumulatively, in degradation or destruction of natural resources in the Scenic Area.

2) Proposed uses or developments that disturb the ground or water drainage on active or stabilized earth flows (landslides)shall require geological evaluation, with adequate mitigation measures designed and applied to the site.

3) Proposals to remove silt and sand from boat channels, repair washed out areas, replace riprap, and repair or replace existing boat ramp areas shall protect the scenic, cultural, recreation, or natural resources.

4) Except as necessary to prevent imminent threat to like or property, proposed uses or developments shall not disturb normal drainage patterns of near wetlands.

5) Where threatened and endangered or sensitive plants or animals are found on a site proposed for development or a change in use, mitigation measures shall be applied for protection. If mitigation will not result in adequate protection, the proposal shall be found inconsistent with the Act.

6) Proposed uses or developments shall not alter habitats of threatened, endangered, or sensitive species, or

riparian areas, without design and implementation of adequate mitigation measures.

7) Proposed uses or developments shall maintain fish habitat at no less than the existing level.

8) In the Special Management Areas, proposed uses or developments shall maintain habitat for cavity nesting birds where practicable through retention of snags and fallen logs and other woody debris.

9) Proposed vegetation management projects or programs for noxious weeds, ground covers, competing vegetation, rights-of-way, or gravel and borrow pits, shall protect the scenic, cultural, recreation, or natural resources.

10) Proposals for enhancement of natural resources are encouraged as long as they will protect the scenic, cultural or recreation resources.

C. LAND USE STANDARDS

Section 6(d) of the Scenic Area Act requires that Interim Guidelines shall include the standards 1 through 9 as listed in Chapter 1. These are standards that apply to individual land or water uses and developments. Guidelines in this section apply these standards to proposed site-specific uses and developments outside Urban Areas. Regardless of the land use or development that is proposed, the guidelines in Section B for protection of scenic, cultural, recreation and natural resources apply as well. Consistency determinations for site-specific land uses and development proposals shall be guided by the following standards:

1. AGRICULTURAL LANDS

OBJECTIVE: To protect and enhance agricultural lands for agricultural uses.

GUIDELINES

a. Both Special and General Management Areas

1) Conversion of agricultural land to open space, recreation development, or forest land is consistent with the Act where such conversion will protect and enhance the scenic, cultural, recreation, and natural resource values of the area. Conversion to other uses is inconsistent with the Act.

2) The number and type of agriculture buildings constructed must be necessary and accessory to, and consistent with, the type of agricultural operations existing or planned in the area.

3) Buildings for processing agricultural products shall be used for products produced primarily on the given or adjacent property. "Primarily" means a clear majority of the product as measured by volume, weight and value. This includes small packing facilities, wine making operations, and other similar uses. Large scale agricultural processing operations for products produced elsewhere are considered industrial uses and are not consistent outside of Urban Areas.

4) Livestock feedlots are inconsistent with the Act.

2. FOREST LANDS

OBJECTIVE: To protect and enhance forest lands in the Scenic Area for forest use.

GUIDELINES

a. Both Special and General Management Areas

1) All forest practices on private lands are governed by the State Forest Practices Acts.

2) Conversion of forest land to agricultural land, recreation development, or open space is consistent with the Act where such conversion will protect and enhance the scenic, cultural, recreation, and natural resources of the area. Conversion to other uses is inconsistent with the Act.

3) Use of forest lands for other compatible uses while retaining the potential to carry out forest practices is consistent with the Act where it will protect and enhance the scenic, cultural, recreation, or natural values, and the use will comply with the appropriate land use guidelines in this chapter.

b. Special Management Areas

1) Forest practices must protect the scenic, cultural, recreation, or natural resources of the Scenic Area.

2) The Forest Service visual management system will be used to evaluate the impact of proposed forest practices on federal and non-federal land. The visual quality objective of Retention shall be applied in the foreground (roughly within one half mile of roads, trails, or key viewing areas), and Partial Retention shall be applied in

the middle-and background, with the result that management activities shall not be visually dominant in the landscape. (A description of the visual management system is available at any Forest Service office.)

3. OPEN SPACE

OBJECTIVE: To protect and enhance open space in the Scenic Area.

GUIDELINES

a. Both Special and General Management Areas

1) Open space resources of a given site shall be protected.

2) Measures are encouraged that enhance the scenic, cultural, recreation, or natural resources of an identified open space area. Enhancement could include the following:

a) improving the usefulness of these lands as fish or wildlife habitat, including wetlands or riparian values;

b) providing additional opportunities for the enjoyment of outstanding views, and/or understanding and enjoyment of historical and archaeological sites by means which do not diminish or threaten to diminish the values of these views or sites;

c) increasing the numbers or the range of rare, threatened, endangered or sensitive species; or

d) restoration in a historically accurate manner or scientifically excavating historic structures, trails, roads and

archaeological sites, provided that any such excavations respect the religious traditions of Native Americans or other peoples whose sites are excavated.

4. COMMERCIAL DEVELOPMENT

OBJECTIVE: To insure that commercial development takes place without adversely affecting the scenic cultural, recreation, and natural resources of the Scenic Area.

GUIDELINES

a. Special Management Areas

1) Commercial development in the Special Management Areas is inconsistent with the Act, except commercial recreation uses and services which are identified in the Recreation Assessment. Until the Recreation Assessment is completed, only those commercial recreation uses conducted outdoors without any new permanent structures may be considered consistent with the Act.

b. General Management Areas

1) Commercial developments shall protect the scenic, cultural, recreation, or natural resources of the Scenic Area.

2) Home occupations which are conducted entirely within pre-existing residences and which are incidental and subordinate to the residential use are consistent with the Act.

3) Signs which identify a commercial enterprise are consistent with the Act when compatible with the scenic, cultural, recreation and natural resurces.

5. RECREATION DEVELOPMENT

OBJECTIVE: To protect public and private recreation resources, to encourage new recreation development which will not adversely affect the Scenic Area resources and which will enhance recreation opportunities and tourism, and to preserve future options for recreation development pending completion of the Recreation Assessment and the Management Plan.

GUIDELINES

a. Both Special and General Management Areas

1) Proposals for recreation developments are encouraged to be integrated into the Recreation Assessment called for in Sections 6(a) and 8(d) of the Act.

2) Commercial recreation proposals shall meet the guidelines for commercial developments.

3) Non-commercial recreation development proposals shall protect the scenic, cultural, recreation and natural resources and shall be compatible in size and scope with the resource values of the Scenic Area. Proposals which take advantage of the unique conditions of the Gorge and which meet a demonstrated need will be given emphasis.

4) Once the Recreation Assessment required by the Act is competed, all recreation development proposals shall

demonstrate compliance with its findings and recommendations.

6. LAND DIVISIONS

OBJECTIVE: To insure that land divisions do not encourage development practices that are inconsistent with the purposes of the Act.

GUIDELINES

a. Special Management Areas

1) For lot line adjustments between neighboring properties, the seller shall maintain a 40 acre minimum lot size if there is a residence on the property.

2) Partitions and short plats are inconsistent with the Act except when the Secretary determines it is desirable to facilitate land acquisition pursuant to Section 6(d)(5) of the Act.

3) Subdivisions are inconsistent with the Act.

b. General Management Areas

1) Lot line adjustments, partitions, short plats, and subdivisions shall protect the scenic, cultural, recreation, and natural resources of the Scenic Area and must protect agricultural land, forest land and open space.

7. RESIDENTIAL DEVELOPMENT

OBJECTIVE: To insure that residential development takes place without adversely affecting the scenic, cultural, recreation, and natural resources of the Scenic Area.

GUIDELINES

a. Both Special and General Management Areas

1) Residential development shall incorporate design features and other considerations so that it will protect the scenic, cultural, recreation and natural resources of the Scenic Area. See Section B for design standards and opportunities for mitigation.

2) When the boundary between Special and General Management Areas divides a parcel, residential development may be consistent in either portion provided that these guidelines are met. This means that there shall be a minimum of 40 acres in the Special Management Area portion for the development to be located therein.

b. Special Management Areas

1) Residential development on a lot less than 40 acres in size is inconsistent with the Act.

2) Multi-family residential developments are inconsistent with the Act.

8. INDUSTRIAL DEVELOPMENT

OBJECTIVE: To limit new industrial development to Urban Areas and to insure that modifications to existing

industrial developments in other areas does not adversely affect the scenic, cultural, recreation, and natural resources.

GUIDELINES

a. Both Special and General Management Areas

1) New industrial development outside the Urban Areas is inconsistent with the Act.

2) A cottage industry which does not visibly alter the land or alter a structure allowed for another consistent use is not considered industrial development for purposes of these guidelines.

3) Processing of agricultural products locally grown or produced on a small scale is considered agricultural use, rather than industrial, under these guidelines.

4) Existing industrial development may be modified only to the extent it does not increase adverse effects on the scenic, cultural, recreation, or natural resources.

5) Expansion of existing industrial facilities outside of Urban Areas beyond existing dedicated sites is inconsistent with the Act.

9. MINERAL RESOURCES

OBJECTIVE: To insure that the exploration, development and production of mineral resources for the primary purpose of using the product, as well as the reclamation of lands, take place without adversely affecting the scenic, cultural, recreation, and natural resources of the Scenic Area.

GUIDELINES

a. Special Management Area

1) Disturbance of the land surface for exploration, development and production of minerals is inconsistent with the Act, except for production of sand, gravel, and crushed rock used only for roads for the production of forest products in a Special Management Area.

2) Production of sand, gravel, or crushed rock for consistent purposes shall protect the scenic, cultural, recreation and natural resources of the Scenic Area. In addition to the information required in the Application Form for a consistency determination, the applicant shall identify methods to provide for prompt stabilization and reclamation of areas disturbed by operations.

3) Production of sand, gravel, or crushed rock for consistent purposes shall be screened so it is not and will not become visible from key viewing areas.

b. General Management Areas

1) Exploration, development, or production of minerals shall protect the scenic, cultural, recreation and natural resources of the Scenic Area. In addition to the information required in the Application Form for a consistency determination, the applicant shall identify methods to provide for prompt stabilization and reclamation of areas disturbed by operations.

2) Mineral exploration, development, and production shall be screened so it is not and will not become visible from key viewing areas.

10. COMMUNITY FACILITIES

OBJECTIVE: To provide for the support of existing communities while not adversely affecting the scenic, cultural, recreation, and natural resources of the Scenic Area.

GUIDELINES

a. Both Special and General Management Areas

1) Community Facilities may be installed as needed to support existing communities and developments, as long as they protect the scenic, cultural recreation, or natural resources.

2) Development of community facilities requires documentation of the necessity for the facility to support other development and public service needs.

3) For modifications to existing utility transmission lines, the Forest Service will participate in the environmental analysis process to identify issues and to develop mitigation measures where needed to protect the scenic, cultural, recreation, and natural resources.

4) New solid waste disposal sites within the Scenic Area are inconsistent with the Act.

DEFINITIONS

The following terms used throughout the Interim Guidelines document are defined. Sources for the definition are listed.

Administrative Review: The process by which a higher official reviews a decision made by a Forest Service officer within 45 days of the decision. Regulations for this process are contained in 36 CFR 211.18.

Adversely Affect (Scenic Area Act, Section 2(a)): "A reasonable likelihood of more than moderate adverse consequences for the scenic, cultural, recreation or natural resources of the Scenic Area, the determination of which is based on;

1) The context of a proposed action;

2) The intensity of a proposed action, including the magnitude and duration of an impact and the likelihood of its occurrence;

3) the relationship between a proposed action and other similar actions which are individually insignificant but which may have cumulatively significant impacts; and

4) proven mitigation measures which the proponent of an action will implement as part of the proposal to reduce otherwise significant effects to an insignificant level."

Agricultural Land: Land used primarily for the production of farm commodities. This includes cropland truck farms, pasture, rangelands, small woodlots, Christmas tree farms, orchards, groves, vineyards, bush fruits, horticultural areas (nurseries), and feeding operations.

Agriculture Building: Structures that are necessary and accessory to an agricultural use and where there would be no need or use for the structure other than because of the agricultural use. These include: structures for storage of agricultural products and supplies, storage and maintenance of farm equipment, shelter for stock, greenhouse

dwellings for workers and/or owners, and other, similar structures related to agricultural use.

Commercial Development: Any facility or use of land or water whose function is primarily the buying or selling of goods or services or both.

Commercial Recreation: Any private (non-governmental) recreational activity or facility for which a fee is charged.

Community Facilities: Basic utilities and services necessary to support development and public service needs, including but not necessarily limited to: water utilities, sanitation facilities, microwave relay stations, communications facilities, local power distribution lines, schools, roads and highways.

Cottage Industry: A manufacturing business operated in a residence or related major structure owned and operated by the full-time residents on the premises when under county permit and with no more than three outside employees.

Cultural Resources: Physical evidence of sites, structures, or objects used by humans and the conceptual content or context of an area (as a setting for legendary, historic, or prehistoric events, or a sacred area of native peoples, etc.). Historic landscapes, such as agricultural patterns, are also considered cultural resources. Four categories of resources will be used for inventory and evaluation purposes:

1) archeological--resource values associated with former occupancy by native cultural groups;

2) historical—values dating from first occupancy by non-native settlers;

3) relic cultural groups—resource values associated with the existence of native people who continue to live in groups practicing the cultural life styles of their ancestors; and

4) recent in origin—outstanding examples of contemporary culture representing achievements which, in the future, are likely to become historically significant.

Cultural Resource Inventory: The formal process of collecting existing information on known cultural resources and locating, through field survey conducted by trained personnel, and documenting as yet undiscovered cultural resources.

Forest Lands: Lands used for growing forest products.

Home Occupation: Any occupation or profession carried on entirely within a residence or major related structure by a member of the family residing in the dwelling and carried on under County permit. This includes bed and breakfast facilities and commercial guide services.

Industrial Facilities or Land Uses: In general, any facility or land use primarily involved in:

1) Assembly or manufacture of goods or products.

2) Processing or reprocessing of raw materials, processing of recyclable materials or non-locally produced agricultural products;

3) Storage or warehousing, handling or distribution of manufactured goods or products, raw materials, agricultural products or recyclable materials for purposes other than retail sale and service; or

4) Production of hydro-electric power for commercial purposes.

Key Viewing Areas: Areas from which large numbers of people view the National Scenic Area portions of the Gorge. These include:

Historic Columbia River Highway
Crown Point
Highway I-84, including rest stops
Multnomah Falls
State Route 14
Beacon Rock
Highway 35 at Panorama Point
Cape Horn
Highway 197
Dog Mountain Trail
Cook Underwood Road
Rowena Plateau
Railroads on both sides of the River
Sciorsus Park
Portland Women's Forum State Park
Seven Mile Hill
Bridal Veil State Park
Larch Mountain
Beacon Rock State Park
Rooster Rock State Park
Bonneville Dam Visitor Centers
Columbia River

Land Forms: Cliffs, talus slopes, unusual rock formations, geologic features, sand dunes.

Landscape Settings:

Developed Setting: Residential, commercial, or industrial complexes are dominant in the landscape. Setting may include rural towns, large commercial or industrial developments, subdivisions, etc.

Rural Setting: Forest, range or agricultural land that is predominately vegetated, but which may have considerable evidence of human occupation such as structures, roads and fields. Structures appear scattered or in small dominant clusters.

Undeveloped Setting: Generally forest or grasslands of moderate to large size in a near-natural condition. Structures or developed features other than roads are rare and isolated.

Livestock Feedlot: Large facility for commercial feeding of livestock, specifically for the purpose of fattening for market. Does not include seasonal feeding of livestock on farms and ranches.

Lot or Parcel: A contiguous unit of land under a single ownership created by a partition, short plat or subdivision in accordance with the applicable state law and local regulations.

Lot Line Adjustment: The transfer of a portion of a lot from one owner to the owner of an adjacent lot resulting in no increase in the number of lots.

Major Development Action: (Scenic Area Act, Section 2(j)): "Any of the following:

1) subdivisions, partitions and short plat proposals;

2) any permit for siting or construction outside Urban Areas of multifamily residential, industrial or commercial facilities, except such facilities as are included in the recreation assessment;

3) exploration, development and production of mineral resources unless such exploration, development or production can be conducted without disturbing the surface of any land within the boundaries of a special management area or is for sand, gravel and crushed rock used for the construction, maintenance or reconstruction of roads within the Special Management Areas used for the production of forest products; and

4) permits for siting or construction within a Special Management Area of any residence or other related major structure on any parcel of land less than forty acres in size."

Mineral Resources: A concentration of naturally occurring solid, liquid, or gaseous material in such form and amount that is locatable or leasible under the mining laws of the United States, or is common variety such as sand, gravel and rock. Minerals include: metalliferous and nonmetalliferous material, oil and gas, and geothermal resources.

Mitigation: (from 40 CFR 1508.20) Mitigation includes the following:

1) Avoiding the impact altogether by not taking a certain action or parts of an action;

2) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; or

4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

Natural Resources: Naturally occurring features including land, water, air, plants, animals including fish, and plant and animal habitat that exist within the Scenic Area.

Open Space: (Scenic Area Act, Section 2(l)):

"Unimproved area that is not agricultural or forest land and that is designated as open space as provided in Section 6(d) of this Act. According to that section, open spaces include:

1) Scenic, cultural, and historic areas;

2) Fish and wildlife habitat;

3) Land which support plant species that are endemic to the Scenic Area or which are listed as rare, threatened or endangered species pursuant to State or Federal Endangered Species Acts;

4) Ecologically and scientifically significant natural areas;

5) Outstanding scenic views and sites;

6) Water areas and wetlands;

7) Archaeological sites, Indian burial grounds and village sites, historic trails and roads and other areas which are culturally or historically significant;

8) Potential and existing recreation resources; and

9) Federal and State wild, scenic, and recreation waterways."

Partial Retention Visual Quality Objective: Land uses and structures may be visible from key viewing areas but must remain visually subordinate to the surrounding natural landscape. Visual characteristics of form, line, color and texture of land uses and structures must remain subordinate to, and have low contrast with, the surrounding natural landscape.

Partition: The creation of two or three lots in accordance with Oregon State statute. Applies only to developments in Oregon.

Recreation Assessment: Analysis of existing and potential recreational opportunities, needs, and potentials as required by Sections 6(a)(3) and 8(d) of the Scenic Area Act.

Recreation Development: Facilities designed to complement, enhance or support a recreational activity or experience. These include but are not limited to campgrounds and picnic areas, recreation vehicle parks, swimming, boating or windsurfing facilities, hiking trails, etc.

Recreation Resources: The leisure time or recreation activity, setting, or experience opportunities that exist in the Scenic Area. For purposes of these guidelines, particular emphasis is given to opportunities that depend on the landscape, natural resources, or conditions which are specific to the Scenic Area.

Residential Development: (Scenic Area Act, Section 2(n)): "Permitting for siting or construction of any residence or other related major structure." Related Major

Structure is any detached structure which is accessory to a residence.

Retention Visual Quality Objective: Land uses and structures are not readily visible from key viewing areas. Land uses and structures are visually consistent with the characteristic form, line, color, and texture of the surrounding natural landscape.

Scenic Resources: The inherent visual quality (appearance and character of the landscape) of the area and its degree of naturalness, and/or the attractiveness of the cultural features.

Short Plat: The creation of two to four lots in accordance with Washington State Statute. Applies only to developments in Washington.

Solid Waste Disposal Site: A site dedicated to the disposal of waste products. May include household waste, yard debris, and/or chemical or industrial wastes. Does not include transfer stations or recycling plants.

Subdivision: The creation of four or more lots in Oregon and five or more lots in Washington in accordance with each state's statute.

Threatened and Endangered Species: Those species whose prospects of survival and reproduction are in immediate jeopardy or are likely to become in danger of extinction in the foreseeable future throughout all or a significant portion of their ranges. These species are listed in 50 CFR 17.11 and 17.12, dated January 1, 1986, published by USDI Fish and Wildlife Service.

Wetlands: Those areas that are inundated or saturated by surface or ground water at a frequency and duration

sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands include marshes, swamps, bogs, and similar areas.